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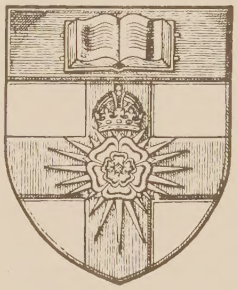

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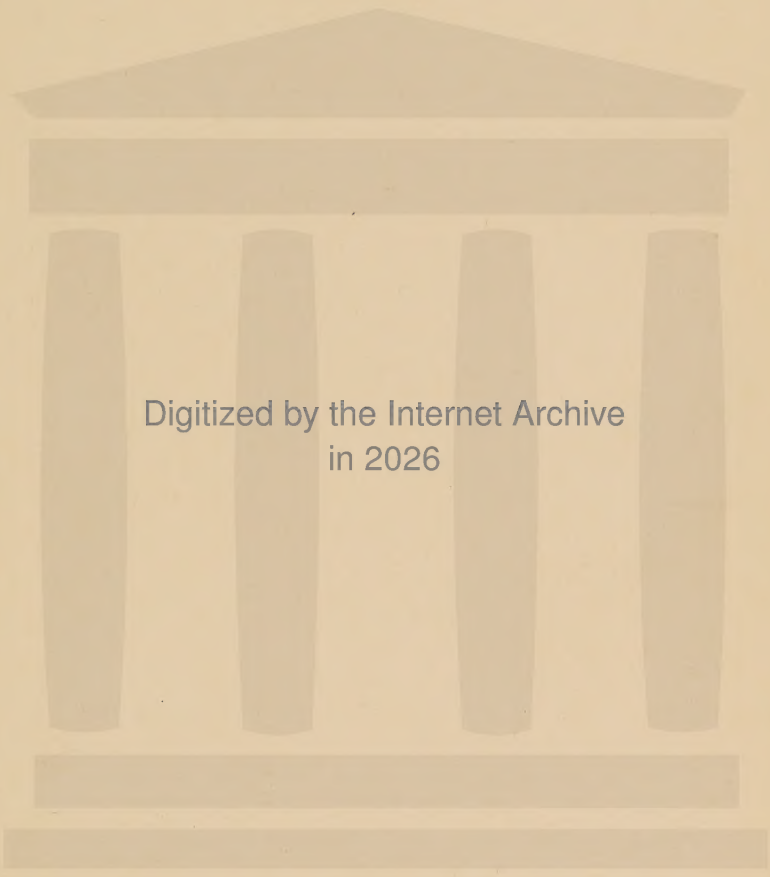

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1911.

January 3. THE RIGHT HONOURABLE LORD COLLINS, *formerly a Lord of Appeal in Ordinary, died at Brighton, at the age of* 68.

April 26. THE RIGHT HONOURABLE RICHARD BURDON, VISCOUNT HALDANE, *one of His Majesty's Principal Secretaries of State, was appointed a member of the Judicial Committee of the Privy Council under the provisions of s.* 1 *of the Act* 3 *&* 4 *Will.* 4, *c.* 41.

July 6. THE RIGHT HONOURABLE SIR JOHN EDGE *and* THE RIGHT HONOURABLE SYED AMEER ALI, C.I.E., *were appointed members of the Judicial Committee of the Privy Council under the provisions of s.* 30 *of the Act* 3 *&* 4 *Will.* 4, *c.* 41.

August 18. THE RIGHT HONOURABLE LORD JAMES OF HEREFORD, *formerly a member of the Judicial Committee of the Privy Council, died at his residence at Epsom, in the* 83*rd year of his age.*

November 30. THE HONOURABLE MR. JUSTICE GRANTHAM *died at his residence in Eaton Square, London, at the age of* 76.

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221	21	*Leadbitter*	*Leadbetter.*
224	footnote (4)	2 Ves.	2 Ves. Sen.
331	7	*Lysight* v. *Edwards*	*Lysaght* v. *Edwards.*
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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

H. L. (E.)
1910
Nov. 1.

FLEMING AND OTHERS . . . . . APPELLANTS;

AND

LONDON COUNTY COUNCIL . . . . . RESPONDENTS.

METROPOLITAN RAILWAY COMPANY . . APPELLANTS;

AND

LONDON COUNTY COUNCIL . . . . . RESPONDENTS.

Metropolis—General Line of Buildings in Street—Buildings erected beyond the General Line—Consent of the Metropolitan Board of Works—Alteration of General Line of Buildings—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75 (*repealed*)—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 27, 216.

In part of a London street there were old houses built before 1862. Between 1862 and 1894, with the consent of the Metropolitan Board of Works under s. 75 of the Metropolis Management Amendment Act, 1862, shops of one storey were built in front of the old houses and between them and the pavement line of the street. Upon an application

H. L. (E.)
1910
FLEMING v. LONDON COUNTY COUNCIL.
METROPOLITAN RAILWAY v. LONDON COUNTY COUNCIL.

by the owners of the shops in pursuance of s. 22 of the London Building Act, 1894, the superintending architect certified that the frontage line of the old houses formed the general line of buildings in that part of the street. The tribunal of appeal varied that certificate by determining that the frontage line of the shops was the general line of buildings in that part of the street:—

Held, without expressing any opinion upon the construction of ss. 27 and 216 of the London Building Act, 1894, that the Metropolitan Board of Works had not altered the old general building line by consenting to the erection of the shops.

Decision of the Court of Appeal, reported as *London County Council* v. *Metropolitan Railway*, [1909] 2 K. B. 317, affirmed.

THE street in question was the Euston Road in the county of London. The tribunal of appeal stated a special case under the London Building Act, 1894, raising for the opinion of the Court the question whether the tribunal of appeal came to a right determination in point of law in the circumstances set forth, and, if not, what should be done.

Those circumstances and the contentions on both sides are fully stated in the report of the case before the Court of Appeal. The Divisional Court (Lord Alverstone C.J. and Walton J.) answered the question in the affirmative. (1) That decision was reversed by the Court of Appeal (Fletcher Moulton and Farwell L.JJ., Sir J. C. Bigham, President, dissenting). Hence these two consolidated appeals.

The Court of Appeal held that the tribunal of appeal were wrong in taking the shops into consideration in fixing the general line of buildings. This decision was based upon ss. 27 and 216 of the London Building Act, 1894, as well as upon s. 75 of the Metropolis Management Amendment Act, 1862. In this House the decision turned upon the Metropolis Management Amendment Act, 1862, s. 75.

Sir Robert Finlay, K.C., and *Macmorran, K.C.* (*A. A. Bethune* with them), for the appellants in both appeals. No question of law arises in these appeals. The definition of the general line of building by the superintending architect or by the tribunal of appeal turns entirely upon a question of fact, namely, what is

(1) [1909] 1 K. B. 116.

the physical condition of the street at the time when the definition is made. That definition must be determined not by what the general line of building was or ought to be, but by what it in fact is. There being no point of law in the case, the decision of the tribunal of appeal is final. By giving so many consents to the building of the shops the Metropolitan Board of Works deprived themselves of the right to refuse consent in future. The result was to alter the old general line of building. [They referred to *Lilley* v. *London County Council* (1) and to ss. 22, 27, and 216 of the London Building Act, 1894.]

C. A. Russell, K.C., and *F. F. Daldy*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, I might be well content to say no more than that I adopt the decision of Fletcher Moulton L.J. and Farwell L.J., but as there has been considerable difference of opinion, I will say a few words.

I think there was a question of law before the tribunal of appeal. It was a question of law whether the Metropolitan Board of Works, by giving consent to a limited use of land in front of the building line, altered in effect the building line and deprived themselves of the right to refuse consent in the future. There was also the construction of the two sections 27 and 216 of the Act of 1894.

In my opinion there was, at the time when these one-storey buildings began to be erected, a building line which seems to have been substantially the same as that which the superintending architect laid down in this case. At one time, namely, in the years succeeding 1862, admittedly no owner could put forward his building without consent or without complying with such conditions as might be imposed by the Metropolitan Board of Works. A good many one-storey buildings were erected, which I think are to be taken to have been erected with consent except in the isolated cases in which the contrary has been proved. Then, says Sir Robert Finlay, a time came when so many consents had been given that consent for any future structures

(1) [1910] A. C. 1.

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was no longer required: the Metropolitan Board of Works had consented so often that it had deprived itself of the right of refusing in future, notwithstanding that the Act of 1862 in terms said that no buildings could be erected beyond the general building line without the permission of the Metropolitan Board of Works. And it was contended that the Metropolitan Board of Works had in fact altered the building line by allowing so many structures to be erected in front of it.

Farwell L.J. has pointed out what would be the result of that contention. He says: "It would be an extraordinary result if a public body, entrusted with the duty of preserving not mere architectural uniformity, but sufficient areas of light and air for the general health and well-being, should, by consenting to the erection of projections of one storey and no more in front of the line of buildings, be held to have thereby consented to the alteration of the line of buildings so as to authorize the erection of seven or eight storey buildings." It is not to be presumed that Parliament intended anything of that kind. Certainly they have not in terms said so.

Another result of Sir Robert Finlay's argument would be that, if for considerations of public health the Metropolitan Board of Works had refused consent to one-storey buildings in a particular part of the street, but had allowed them in the greater part of the street, the Metropolitan Board of Works would be no longer able to prevent buildings even on sites where the public welfare required a vacant space. It seems to me, when those results follow from an argument, it requires to be investigated with the strictest scrutiny. Having so investigated it, I can find no ground for thinking that the Act of 1862 intended anything of the kind. Each consent was an exception, and assumed that the building line remained.

For that reason I think that this appeal must be dismissed, and it is, therefore, unnecessary to enter upon the other ground which was relied upon by the Court of Appeal, namely, that under the statute of 1894 the respondents were in the right. I do not wish to express any difference of opinion upon that point, but it becomes unnecessary in the view I take of the earlier point.

THE EARL OF HALSBURY and LORDS ATKINSON and SHAW OF DUNFERMLINE concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 1, 1910.

Solicitors: *Charles de W. Kitcat; Edward Tanner.*

[HOUSE OF LORDS.]

LEES AND ANOTHER . . . . . APPELLANTS;

AND

DUNKERLEY BROTHERS . . . . . RESPONDENTS.

Master and Servant—Common Employment—Employer and Workman—Injury to Workman from Negligence of Fellow Workmen—Compensation—Indemnity—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

The doctrine of common employment does not apply as between fellow workmen. Where injury has been caused to a workman by the negligence of fellow workmen in committing a breach of statutory regulations imposed for the protection of the workmen, there, if the injured workman has recovered compensation against his employer under the Workmen's Compensation Act, 1906, the employer is entitled to be indemnified by the fellow workmen whose breach of the statutory regulations caused the injury.

THE respondents, who were cotton spinners, employed the appellants to mind the dangerous machinery in their factory. By the negligence of the appellants in starting the machinery and their breach of the regulations under the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 85, a boy employed in the factory under the direction of the appellants was injured. Each of the appellants was convicted of a breach of the regulations made by the Secretary of State under the Act. Upon an application for arbitration and compensation to the injured boy the county court judge awarded a weekly sum to be paid to the boy

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by the respondents. By the consent of the parties the liability of the appellants to indemnify the respondents in respect of the compensation was left to the county court judge to settle in the arbitration. The learned judge held that the appellants were liable to indemnify the respondents against the compensation, and this decision was affirmed by the Court of Appeal (Cozens-Hardy M.R., Buckley and Kennedy L.JJ.), who followed *Groves* v. *Wimborne*. (1) It was there held that the defence of common employment is not applicable in a case where injury is caused to a servant by the breach of an absolute duty imposed by statute upon his master for the servant's protection. Hence this appeal.

By s. 6 of the Workmen s Compensation Act, 1906, it is enacted that—

"Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof:—

"(1.) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and

"(2.) If the workman has recovered compensation under this Act the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act."

Sankey, K.C. (*Adshead Elliott* with him), for the appellants. *Groves* v. *Lord Wimborne* (1) does not decide the point in this case. The employer was there held to be liable: the question here is whether the fellow servants are liable. The employer is under a contract with his workmen. There is no contract

(1) [1898] 2 Q. B. 402.

between the workmen with one another. The defence of common employment as deduced from *Priestley* v. *Fowler* (1) applies to the present case. If a master is not liable to his servant for the negligence of a fellow servant, neither is the fellow servant liable. There is nothing in the Workmen's Compensation Act to create a liability in the workmen towards one another. Sect. 6 in using the words "some person other than the employer" does not point at fellow workmen. If they were aimed at they should have been specifically mentioned.

In *Southcote* v. *Stanley* (2) Pollock C.B. said: "The reason for the rule is that the servant undertakes to run all the ordinary risks of service, including those arising from the negligence of his fellow servants. The rule applies to all the members of a domestic establishment so that the master is not in general liable to a servant for injury resulting from the negligence of a fellow servant; *neither can one servant maintain an action against another for negligence whilst engaged in their common employment.*" *Wiggett* v. *Fox* (3) may be cited in favour of the respondents, but it does not decide the point now in question. [*Wright* v. *Roxburgh* (4) was also cited.]

C. A. Russell, K.C., and *E. C. Burgis*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, I think this appeal must be dismissed.

An indemnity is payable if it comes within the following words: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof." Here there was an "injury for which compensation was payable" and it was "caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof." That is clearly so in my opinion.

(1) (1837) 3 M. & W. 1.

(2) (1856) 1 H. & N. 247, 250; 25 L. J. (Ex.) 339. The words in italics are not in the *Law Journal* report, which varies considerably from the other report.

(3) (1856) 11 Ex. 832; 25 L. J. (Ex.) 188.

(4) (1864) 2 M. 748.

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But it is said on behalf of the appellants, "No, there is no liability in one servant towards another in respect of negligence in a common employment." No authority is quoted for that strange doctrine except a dictum in one of two reports of a case which is supposed to have been uttered by Pollock C.B. I respectfully dissent from that, if Pollock C.B. ever expressed that opinion.

We are in fact asked to extend, or rather to distort the doctrine of, *Priestley* v. *Fowler.* (1) I have no desire to extend that doctrine, but I must point out that in that case the Court implied a term in a real contract, whereas in the present case we are asked to imply a contract where it is perfectly obvious there is no contract at all, namely, in the relation between two fellow servants.

I can hardly imagine a more dangerous or mischievous principle than that which is sought to be set up here. It may be right or wrong to say, as *Priestley* v. *Fowler* (1) says, that a man is not to be responsible for the negligence of his agents. That is decided law and I make no comment upon it. But it is a very different proposition to say that a man is not to be responsible for his own negligence. That would mean a free hand to everybody to neglect his duty towards his fellow servant and escape with impunity from all liability for damages for the consequences of his own carelessness or neglect of duty. Every one must have an interest in maintaining the law in a sense hostile to such a proposition, and I should think that of all classes in the community workmen who work together in many dangerous employments have the greatest interest of all in preventing the doctrine from being accepted.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion and for the same reasons.

LORD ATKINSON. My Lords, I concur for the same reasons.

LORD SHAW OF DUNFERMLINE. My Lords, I concur, and I only think it necessary to add one observation in view of the

(1) 3 M. & W. 1.

citation of a Scotch authority which was mentioned by the learned counsel for the appellants. It is the case of *Wright* v. *Roxburgh*. (1) Certain workmen were killed by an explosion of fire-damp in a mine. It was held that the occurrence took place by reason of the fault of the underground manager. Both he and the coalmaster were sued. It was held that the doctrine of common employment applied, and the employer, the master, was accordingly assoilzied. But no doubt whatever was entertained that the underground manager was civilly liable in damages,—in respect of the deaths of the miners,—to their families. In the words of Lord Benholme, "The explosion of the fire-damp from a sudden introduction of the fresh air by its own downcast, so as to mix with the foul air accumulated during the stagnation in its own workings was quite sufficient, as these scientific witnesses say, to occasion the explosion. Now it appears to me that Morris, the man by whom this operation was performed, was aware that Phillips and Wright were in the upper workings; and he says himself that he did not think it worth while to send them out. He was aware that this was a dangerous operation; he was told so by two persons at the time, and he must have known it was so. I think his own experience in regard to the former explosion and accident that happened in the Ell seam ought to have made him cautious in venturing on such an operation, which all the scientific witnesses say, in a fiery pit such as this, was a dangerous one. I think therefore there can be no doubt that as against Morris this case is made out." Decree accordingly passed against Morris, the mine manager and the fellow servant who had caused the deaths of the unfortunate men.

As I say, my Lords, there was no doubt then and, so far as I know, there never has been any doubt since on such a point in the law of Scotland. The law of England is the same.

When I look at the facts of the present case I find that the appellants are persons who have been so negligent as to lay themselves open to conviction as offenders against the Factory Act. Under those circumstances I venture respectfully but strongly to agree with my noble and learned friend on the woolsack that it would be of the worst possible consequence to

(1) 2 M. 748, 752, 753.

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allow the ordinary liability attaching to negligence causing injury or loss of life to be escaped from as is here sought.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, November 3, 1910.

Solicitors: *Rawle, Johnstone & Co., for Ashcroft, Maw & Shimeld, Oldham; Percy J. Nicholls, for John Taylor, Manchester.*

[HOUSE OF LORDS]

H. L. (E.) 1910 *Nov.* 9.

LOWERY (PAUPER) . . . . . APPELLANT;

AND

WALKER . . . . . RESPONDENT.

Negligence—Savage Animal—Liability of Owner.

Distinguished. EDWARDS *v.* RAILWAY EXECUTIVE [1952] A.C. 737

The respondent, who owned a savage horse which he knew to be dangerous to mankind, put it, without giving any warning, into a field of which he was the occupier and which he knew the public were in the habit of crossing without leave on their way to a railway station. The appellant in crossing the field was attacked, bitten, and stamped on by the horse. The county court judge found as a fact that the respondent was guilty of negligence in putting a horse which he knew to be ferocious into a field which he knew to be habitually crossed by the public and gave judgment for the appellant and 100*l.* damages:—

Held that, the effect of the learned judge's finding being that the appellant was in the field without express leave but with the permission of the respondent, the appellant was entitled to recover.

Decision of the Divisional Court, [1909] 2 K. B. 433, and decision of the Court of Appeal, [1910] 1 K. B. 173, reversed.

ON the trial of the action in the county court at Whitehaven by the appellant against the respondent evidence was given that for thirty or forty years the public had crossed the field by a track on their way to a railway station, and that the respondent had warned off persons as trespassers and had complained to the police, but had declined to take proceedings because some of the persons were his customers for milk.

The learned county court judge made a note of his decision in which he wrote, "No doubt the plaintiff was a trespasser." Some days after the judgment but before notice of appeal was given the learned judge added to his note these words: "On the question of trespass I came to no definite conclusion. The defendant only occupied for fifteen years. I had evidence of the use of the path for thirty or forty years. The defendant put up a notice fifteen years ago but would not prosecute."

The Divisional Court (Darling and Pickford JJ.) set aside the judgment and entered judgment for the respondent, and this decision was affirmed by the Court of Appeal (Vaughan Williams and Kennedy L.JJ., Buckley L.J. dissenting). Hence this appeal.

The contentions on both sides are so clearly and fully set forth in the report of the decision of the Court of Appeal that it is unnecessary to repeat them here. In this House their Lordships expressed no opinion upon the authorities, their decision turning on the construction of the learned county court judge's finding.

Holman Gregory, K.C., and *W. A. Jowitt*, for the appellant.
Leslie Scott, K.C. (*H. Beazley* with him), for the respondent.

LORD LOREBURN L.C. My Lords, I think this case should be determined upon the actual findings of the learned county court judge. It is true there has been some question about what he decided, and it appears that some little time after he had delivered the judgment he made an alteration in regard to a phrase he had used. I think it was quite legitimate to do so, because the word he used was capable of being misunderstood, or understood in one sense rather than in another, and I see no objection to his explaining to the Court and to the parties the sense in which he used the word.

He has found certain facts. He has not found them according to the letter of legal phraseology, but he has presented to us a view of the facts; and I think what that view—by which we are bound—amounts to is this: He will not find whether there was a right of way or not; therefore the plaintiff did not

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establish that he was in the field according to a right to be in the field. Again the learned judge, I think, found that there was no express leave given to the plaintiff to be in that field; but I think the effect of his finding is that the plaintiff was there with the permission of the defendant, because he finds that the field had been habitually used by the public as a short cut, and he says that the defendant was guilty of negligence in putting a horse which he knew to be dangerous into a field which he knew was habitually used by the public. That being the case, we ought not to refine upon the language which the learned judge has used. Perhaps it would have been better—indeed I think it would have been better—had he been more explicit in saying what it was that he did find and what it was that he did not find; but I think in substance it amounts to this: that the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal.

My Lords, I will not enter upon the further field of law—itself somewhat wide and not free from many difficulties—because I do not think the facts of this case require it.

Under those circumstances and for those reasons I think the appeal ought to be allowed.

EARL OF HALSBURY. My Lords, I entirely concur with the judgment which the Lord Chancellor has delivered and for the reasons which he has given, and I only wish to say one additional word with regard to the question of what the learned county court judge has found.

The learned judge used an ambiguous word. I suppose nine out of ten people would distinguish between a person who was at a place as of right and a person who was a mere trespasser. The learned judge did, I think inadvertently, in the first instance

use the word "trespasser," which would have carried the learned counsel for the respondent all the way he wants to get, to a somewhat difficult and intricate question of law upon which various views may be entertained. But seeing that there was a misapprehension, or might be a misapprehension, in the sense in which he used the word "trespasser," the learned judge himself points out in terms that he does not find, and did not intend to find,—as I think indeed the whole substance of his judgment shews he did not intend to find,—that the injured man was a trespasser in the sense in which that word is strictly and technically used in law.

My Lords, I think we are bound by the finding of the learned judge, and I should hesitate very much to assent to the view which Vaughan Williams L.J. seems to have entertained, that there was something wrong in his adding that to his note. He candidly admits that it was added afterwards, but what he says in effect is this: I have used an ambiguous word, and I wish it to be understood that when I used that word I did not use it in the technical sense of the law. My Lords, I think we are bound not only by the original finding of fact, but by what he says he intended to convey by his words. It is not, as the learned counsel for the respondent suggested, that the learned judge has changed his mind afterwards, which I agree would be quite inconsistent with the Act of Parliament, but what he does say is, I have used a word which I think upon reflection is capable of being misunderstood and I now want to explain in what sense I have used the word. I think he was entitled to do that, just as any one of us here, in looking over a judgment afterwards, may think we have used an inappropriate word and may substitute one that is more appropriate to the occasion.

As to the other question which was intended to be argued by the learned counsel for the respondent, who I am afraid is disappointed because the view which we take prevents that question arising, I will only say that I myself would absolutely decline to give any judgment upon that subject, because in this case I am of opinion that what the learned judge has done has prevented that question arising. In his finding he has

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raised the real proposition with which we are dealing, namely, whether or not a person who knows that the public are going over his ground, and going over it habitually, is entitled without warning or notice, or any other precaution whatsoever, to put a dangerous beast where he knows it may be probable,—and almost certain if the thing continues,—that the beast will sooner or later do some injury to persons crossing the ground, and crossing it in one sense with his permission—not that he has given direct permission, but that he has declined to interfere and so acquiesced in their crossing it. If he has acquiesced in their doing so, he is bound to take the ordinary precautions to prevent persons going into a dangerous place where he knows they are going, and going by his acquiescence without notice or warning or any form of security to prevent the injury happening which did happen.

Under those circumstances, my Lords, I am of opinion that the judgment appealed from ought to be reversed.

LORD ATKINSON. My Lords, I concur. On the interpretation which I think is most rightly and properly put upon the findings of the learned county court judge, it is clear that the plaintiff was lawfully in the place where the injury happened to him. That being so, it is clear, I think, upon authority that the respondent owed a duty to him to take care of this dangerous animal which the respondent put there, and which injured the plaintiff by the very vices of which the respondent was well aware.

LORD SHAW OF DUNFERMLINE. My Lords, I should think it strange if a learned county court judge should not be permitted to explain deliberately in writing what he has said in giving judgment, so as to avoid any possible misconception or misconstruction of the language he has employed. I am glad to know from your Lordships that there is no rule of procedure which forbids that by the law of England. In the present case, accordingly, looking at the findings of the learned judge, I observe that they are threefold. First, that the place where this unfortunate attack took place was habitually used by passengers on foot, and

this to the knowledge of the defendant; secondly, that the horse was, and was known by the defendant to be, a dangerous animal with savage propensities; and, thirdly, that the horse, with these known vices, was put by the defendant in that place so habitually traversed. In those circumstances, my Lords, I have no doubt that liability attaches to a defendant so acting.

I specially desire, my Lords, to reserve any opinion as to the further doctrine—applicable to the case of a mere trespasser as such—and further to add that I must not be held as in any respect assenting to the pronouncements by Darling J. and Vaughan Williams L.J. on that larger topic.

Order of the Court of Appeal and order of the King's Bench Division reversed. Judgment of Judge Steavenson restored with costs here and below; the costs here on the pauper scale.

Lords' Journals, November 9, 1910.

Solicitors: *Blyth, Dutton, Hartley & Blyth, for Chapman & Baxter, Whitehaven; Harrison & Powell, for Brown, Auld & Brown, Whitehaven.*

[HOUSE OF LORDS.]

H. L. (E.) 1910 *Dec.* 12.

OWNERS OF CARGO OF S.S. TONGARIRO Appellants;

AND

OWNERS OF S.S. DRUMLANRIG . . . . Respondents.

THE DRUMLANRIG.

Admiralty—Collision—Damage—Both Ships to blame—Limitation of Liability — Cargo Owner — Division of Loss — Rule in force in the Court of Admiralty—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

The rule laid down in *The Milan*, (1861) Lush. 388,—that where both ships are to blame for a collision the owners of cargo on one ship can recover a moiety of their damages and no more against the owners of the other ship—is a rule in force in the Court of Admiralty within the meaning of s. 25, sub-s. 9, of the Judicature Act, 1873.

Decision of the Court of Appeal, [1910] P. 249, affirmed.

In November, 1908, two British steamships, the *Tongariro* and the *Drumlanrig*, came into collision in the English Channel. It was admitted that both were to blame, and the owners of the *Drumlanrig* admitted their liability for a moiety of the damage done to the cargo on board the *Tongariro*. In a suit for limitation of liability brought by the owners of the *Drumlanrig* an appearance was entered by the owners of the *Tongariro* cargo, who claimed not only a moiety but the whole of the damages sustained in respect of their cargo.

Sir Samuel Evans (President) held that they were entitled to a moiety only of the fund in Court and decreed accordingly. This decision was affirmed by the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley L.JJ.). Hence this appeal.

1910. Nov. 10, 14. *Sir Robert Finlay, K.C.* (*Bailhache, K.C.*, and *Hugh C. S. Dumas* with him), for the appellants. The onus lies on the respondents to shew any sound principle under which an owner of cargo innocent of blame in a collision is restricted to recovering one half of his loss. In admiralty the imputation of blame to an innocent owner of cargo was never made, nor any kind of identification with the faulty ship which carried the cargo

suggested. Those ideas existed in 1849 at common law with respect to passengers on vehicles—*Thorogood* v. *Bryan* (1)—and were finally extinguished by this House in 1888: *The Bernina.* (2) Why should they be applied to vessels and owners of cargo? The decision in 1888 was that the whole of the loss should be recovered. Why should that principle not be applied in the Court of Admiralty to innocent owners of cargo? The restriction to half the loss may have been a rule or a practice "hitherto in force" within the meaning of the Judicature Act of 1873, s. 25, sub-s. 9, but it was not a sound rule: it was founded on an erroneous principle or on a compromise between a sound principle and an erroneous practice. It has been frequently doubted and the opportunity of correcting it has now arrived.

[The authorities are fully discussed in the report of the decision of the Court of Appeal and in the judgments in this House.]

Aspinall, K.C., and *Laing, K.C.* (*R. H. Balloch* with them), for the respondents. The restriction to one half the loss in admiralty was sanctioned in 1824 in the House of Lords—*Hay* v. *Le Neve* (3)—and has never been departed from. Whether it be right or wrong in principle is another question, but the practice is too well established to be now overthrown: *The Milan.* (4)

Sir Robert Finlay, K.C., in reply.

The House took time for consideration.

Dec. 12. LORD LOREBURN L.C. My Lords, I think it is clear that the Court of Appeal was right.

The plaintiffs, owners of cargo, had their goods on board the steamship *Tongariro.* This vessel collided with the steamship *Drumlanrig,* and it is to be taken that both vessels were to blame. Accordingly the plaintiffs claim against the owners of the *Drumlanrig* damages for injury to their goods

(1) (1849) 8 C. B. 115.
(2) (1888) 13 App. Cas. 1.
(3) (1824) 2 Shaw's Scotch Appeals, 395.
(4) Lush. 388.

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by the collision. It is only a question as to damages. Can plaintiffs recover the whole of their loss, or only 50 per cent. of it?

Under the Judicature Act of 1873, s. 25, sub-s. 9, "In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail."

In order to apply this statutory direction, let me first see what is the rule at common law. In 1873, when the Act was passed, the supposed rule was that the owner of goods in such a case could recover nothing at all, because he was imagined to be identified with the ship in which his goods were stowed, and, she being in fault, he also was disabled by her disability. There was really nothing to say either in principle or good sense for this metaphysical view, and it was finally exploded by the decision of this House in *The Bernina* (1), which decided that so far from recovering nothing the owner of cargo could recover the full amount of his loss.

The law of admiralty was different. In admiralty the rule had been for a long time that, in case of collision between two ships where both were to blame, each shipowner could recover from the other one half his loss. In 1861, in *The Milan* (2), Dr. Lushington directly decided that the owner of cargo in one of the ships could in like manner recover only one half of the loss from the other ship. And he expressly repudiated the supposed doctrine of common law, relying upon the uniform practice in admiralty. How old that practice may have been in regard to cargo is not quite certain. Dr. Lushington spoke of it as uniform forty-nine years ago.

My Lords, the question before us is, to my mind, very simple. It is this: Was this admiralty rule in 1873 a rule "hitherto in force," or was it not? That is to say, was it a rule under which the Court regularly acted? I think it clearly was. Accordingly, it prevails over the common law rule, whether we take that to be the erroneous practice which obtained before

(1) 13 App. Cas. 1. (2) Lush. 388.

the decision in *The Bernina* (1) or the sound law which obtained after it.

Sir Robert Finlay's argument, when sifted, really means that although this admiralty rule had in 1873 been "hitherto in force," yet that it ought not to have been in force, because it was founded on some sort of a compromise with the erroneous and now discarded practice in common law, and, therefore, must fall when the error in regard to the common law was corrected. I think it is not so in fact, and that the practice as to the cargo owner only receiving one half his loss may have been based upon the similar and long-settled practice as to shipowners. Perhaps the analogy was a false one and the practice not really fair. Indeed, that is my own opinion, and I should be very glad if I could award to these plaintiffs the full amount of their claim. But we must obey the Act of Parliament, and when once it is made good that the rule as to recovering one half only was in 1873 "hitherto in force," we have no choice. If this state of the law is to be remedied, the remedy must be provided by the Legislature. It is no valid argument to say it ought not to have been ever established.

It may indeed be said that the effect of this view is to stereotype all the admiralty rules which were in force in 1873 where they varied from the common law rule, even if it should afterwards appear that they ought not to have been in force. On the other hand, the opposite construction would altogether ignore the words of the Act, "hitherto in force." I do not feel at liberty to do this.

EARL OF HALSBURY. My Lords, for my own part I think the whole case that has to be decided here lies in the construction of those words in the Judicature Act of 1873; and whatever might have been my opinion,—and I confess it has wavered very much in the course of this case,—I must abide by the plain language of the statute. It seems to me that where there have been rules which have been in force, and the words of the statute are "rules hitherto in force," we must give effect to that enactment. While I entirely agree with the view pointed

(1) 13 App. Cas. 1.

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out by my noble and learned friend Lord Atkinson of what the Courts—Courts of Appeal as well as other Courts—are supposed to do, that it is not to make law but simply to affirm what the law is and so to represent it, on the other hand I should have felt extreme difficulty in deciding this case but for the express words of the enacting clause of the Act of 1873.

The real truth is that the Court of Admiralty—that is to say, the Court of the Lord High Admiral—administered a different system of jurisprudence, and it is not apt language to speak of an alteration of the law as a rule of Court; but I have come to the conclusion that what the Legislature meant was that there should be from henceforth a change in the law, if there was any difference. I do not think that it was very apt language, and I somewhat lament that the opportunity was not taken to put in express terms what in such cases as this should be the law. It is a part of that system of legislation by reference which I think has led to so much difficulty in the explication of the law. At the same time I must abide by what the law is as exhibited by what are called the rules of the Admiralty Court, and I think I must take it that the Legislature meant, if there was any difference, to change the law.

There is no doubt that the administration of a law different from the Common Law in the Lord High Admiral's Court was not a question simply of practice such as would be appropriately described as a rule of Court. It was a distinct system of jurisprudence which under the circumstances was administered (and I must assume by authority which was good) in that Court. One knows, historically of course, that from the reign of Richard II. downwards there was a constant conflict with the Courts of Common Law, and, in the form of prohibition, it arose from time to time. If one reads the preface written by Lord Tenterden when he published his work on Merchant Shipping, a preface dating I think from 1802, one will see the different elements from which what was called the jurisdiction in admiralty arose, and from which was compounded the system of jurisprudence that was administered in the Court of Admiralty. I say this without reference to what was the

true view of the law, and I agree that the jurisdiction of the Court is to lay down only what is the existing law, and not to attempt to alter or even improve it; but while I say that, on the other hand I think what would have been an extremely interesting archæological disquisition is simply settled by this, that the Legislature says that what was constantly called (whether rightly or wrongly) the rule of the Admiralty Court as laid down is that which we are now to accept as the law; and although I feel very strongly the effect of Sir Robert Finlay's argument on the subject, I think these words estop me from going further than this: to ascertain, if I can, what was the rule of the Court of Admiralty, and if I can ascertain it to apply it in such a case as this.

Under these circumstances, my Lords, I have no alternative but to say that I agree with the decision which has been given, and I agree accordingly with the motion to be made by the Lord Chancellor.

LORD ATKINSON. My Lords, the sole question for decision in this case is this: whether the rule of law in force in the Courts of Admiralty in this country in the year 1873, to the effect that when two ships collide, each being found to blame, the innocent owner of the cargo carried by one of them is only entitled to recover half the damages he has sustained from each ship in default, is still in force. This again depends upon two considerations—first, whether this rule is in reality based on the principle that the cargo carried is identified with the ship which carries it, according to the principle laid down in the case of *Thorogood* v. *Bryan* (1), and second, whether, even if this be so, the rule is stereotyped and continued in force by the provision of s. 25, sub-s. 9, of the Judicature Act of 1873. Your Lordships, in the case of *The Bernina* (2), undoubtedly held that the case of *Thorogood* v. *Bryan* (1) was wrongly decided, and that the principle laid down in it was erroneous in law, and Sir Robert Finlay contends that because of this the rule of law based upon the principle so held to be erroneous must, in the construction

(1) 8 C. B. 115. (2) 13 App. Cas. 1.

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of the above-mentioned provision of the Judicature Act, be treated as non-existent, since the rules mentioned in the sub-section mean true rules of law, not rules laid down in misapprehension of what the law on the subject really is.

I presume that every decision of your Lordships' House as a final Court of Appeal must in strictness be regarded as a decision simply declaring the law, or as a decision declaring the law and applying it to the particular facts of the case, or as a decision applying to those facts the law as already declared by your Lordships on some previous occasion. In your capacity as a final Court of Appeal you, in the strict sense, neither make new law nor alter the old law, but merely declare what the law really is. When, therefore, a decision of any tribunal brought before your Lordships on appeal is reversed, it must be assumed that that tribunal has misunderstood the law and declared it erroneously, or has misapplied the law, truly interpreted, to the facts of the case.

When, therefore, the law laid down by such a tribunal as the Court of Admiralty, no matter how often, or over what a period of time, is declared by your Lordships' House to have been laid down erroneously, the rule must be treated as if it had never existed—treated as a mere misrepresentation or misstatement of the law, which, this being once authoritatively pointed out, goes for nothing. I shall presently consider whether Sir Robert Finlay's contention as to the foundation of this rule be sound or not; but, even assuming that it is sound, I do not think that the rule, however erroneous, can be thus got rid of. The words of the sub-section are: "The rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail." The words "hitherto in force," or words equivalent to them, do not occur in sub-ss. 10 or 11 of the same section dealing with the conflict between the rules of the common law and the rules of law as administered by the Court of Equity. The words "so far as they have been" are also peculiar to this sub-section. They point apparently to the past, and it certainly would appear to me that both these phrases have been introduced in order to stereotype and perpetuate the rules of law in force in the Court of Admiralty

when this Judicature Act of 1873 was passed; while sub-ss. 10 and 11 cover not only rules of law already enforced in the Court of Equity, but rules which might in the course of time be adopted, and be in antagonism either with the rules of the common law then existing or thereafter to be evolved. I am unable to see what other object could have been aimed at, or what other purpose subserved, by the introduction of these words. On whatever principle this rule of law was in reality founded, I think these words are too strong to be overcome, and that the rule must be held to be still in force, and must be held to prevail over any rule of the common law with which it is in conflict.

The question remains, is this rule in reality based upon the principle of *Thorogood* v. *Bryan*? (1) If not, its authority is untouched by the case of *The Bernina*. (2) Well, in the first place the cargo is not completely identified with the ship that carries it, for its owner, though he, like the owner of that ship, is only entitled to recover half the damage sustained from the owner of the other ship, is entitled to recover the other half from the owner of the carrying ship. Again, Dr. Lushington in the *Milan Case* (3) discusses this rule, first, from the point of view of its abstract justice, and, secondly, from that of the principles on which the admiralty practice is founded. As to the first he says: "The only inference I can draw from this view of the matter is that beyond all doubt an action would be maintainable by the owners of cargo against the owners of either vessel, but to what extent damages should be recoverable against one party only is left an open question."

He then proceeds to deal with the rule of the Admiralty Courts, and, after pointing out that *Hay* v. *Le Neve* (4) decided that the owner of the cargo is only entitled to recover half the damages from the ship which does not carry it, he says: "Abstract justice might give a remedy to the owner of the cargo against the owner of each vessel in proportion to the culpability of each, but as it is impossible, where both of these

(1) 8 C. B. 115.
(2) 13 App. Cas. 1.
(3) Lush. 388, at p. 401.
(4) 2 Shaw's Scotch Appeals, 395.

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are in fault, strictly to apportion the blame, by an equitable though arbitrary rule, or, as it has been called, a judicium rusticorum, the opposing ship is made liable to one half only of the damage, and the innocent owner of the cargo is left, as to the other half, to sue the owner of the ship on board which his goods were carried. I do not see injustice in this arrangement; on the contrary its purpose is equity." He then proceeds to repudiate in most explicit terms the authority of *Thorogood* v. *Bryan* (1) and refuses to be bound by it. He says: "It is difficult to conceive how it can be contended that he, i.e., the owner of the cargo, is particeps criminis when he is not so either as principal or agent. It is argued that he shall be so considered, and deprived of his remedy because he himself or his agent selected the ship by which his goods were carried. But there is, in my judgment, in the mere selection of the ship for the conveyance of his cargo, none of the ingredients which constitute any kind of responsibility for a collision, for I cannot conceive a responsibility for an act done where the individual has not, either by himself or his agent, any power of interference or control."

This would appear to me to be the precise line of reasoning which led the Court of Appeal and your Lordships' House in the case of *The Bernina* (2) to decide that *Thorogood* v. *Bryan* (1) was wrongly decided, and to overrule it and the case of *Armstrong* v. *Lancashire and Yorkshire Ry. Co.* (3) which followed it. Dr. Lushington proceeds to add, "I decline to be bound by *Thorogood* v. *Bryan* (1), because it is a single case; because I know upon inquiry that it has been doubted by high authority; because it appears to me not reconcileable with other principles laid down at common law; and lastly because it is directly against *Hay* v. *Le Neve*." (4) Lord Esher, commenting in the Court of Appeal (5) in the *Bernina Case* upon the passage in Dr. Lushington's judgment, says: "It has been supposed that the ultimate judgment of Dr. Lushington was inconsistent with this stout disagreement, but he decided to give

(1) 8 C. B. 115.
(2) 13 App. Cas. 1.
(3) (1875) L. R. 10 Ex. 47.
(4) 2 Shaw's Scotch Appeals, 395.
(5) (1887) 12 P. D. 58, at p. 76.

the plaintiff only half his loss, upon wholly other grounds peculiar to the Admiralty Court, namely, that it had always been the practice there, instead of saying that an innocent plaintiff might recover his whole loss against any one wrong-doer, to say that he must recover part from one and part from the others; and, if there are only two, half from each. He said in terms that the plaintiff must sue the owner or owners of the ship in which his cargo was for the other half."

In *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (1) Lord Blackburn points out that this relief cannot be given to the owner of the cargo on the ground that the owners of each of the ships in fault are, relatively to the owner of the cargo, in the position of joint wrong-doers, as is apparently suggested in *The Lord Melville.* (2) He says: "In the possible event of one set of owners proving insolvent, whilst the others were solvent, the owners of cargo would, if the rule was as laid down in *The Lord Melville* (2), 'that the owners were liable jointly,' receive full indemnification for his loss from the solvent owners. By the rule as laid down in *Hay* v. *Le Neve* (3) he only gets one half from them, and gets a dividend only from the insolvent owners."

It would appear to me, therefore, that the rule applied in the *Milan Case* (4) is not based upon the principle of *Thorogood* v. *Bryan* (5) at all, and was not so regarded, but that it is based rather on some supposed principle of equity and justice to the effect that, as the innocent owner of the cargo suffered by the negligence of each of the ships found to blame, each should compensate him for a portion of his loss; and that, as it was found impossible to measure these respective portions according to the relative culpability of the two wrong-doers, the portions were made equal, the owner of each ship being thus made liable for half the damage.

I am, therefore, of opinion that on both these grounds the judgment appealed from was right, and that the appeal should be dismissed with costs.

(1) (1882) 7 App. Cas. 795, at p. 819.
(2) (1816) 2 Shaw's Scotch Appeals, 402.
(3) 2 Shaw's Scotch Appeals, 395.
(4) Lush. 388.
(5) 8 C. B. 115.

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LORD SHAW OF DUNFERMLINE. My Lords, I am of opinion that the judgment of the Court of Appeal in this case should be affirmed.

A collision took place between the two ships *Tongariro* and *Drumlanrig* under circumstances in which it is admitted that both vessels were in fault. A claim is made for damage to cargo on board the *Tongariro*. Not for very many years would it have been doubted that in such a case the owners of cargo were entitled to recover their damages distributed in moieties between the two ships. In the present case, however, it is maintained that this rule of distribution is not a rule of the Admiralty, but is a mistake of many years' standing, arising out of a decision of Dr. Lushington in the *Milan Case* (1), pronounced in the year 1861. It is accordingly further maintained that, there being no rule of the Admiralty applicable to such a situation, the rules of common law liability apply, and that the owners of the cargo on board the *Tongariro* are accordingly entitled to recover not a moiety, but the whole, of their damages from the owners of the ship *Drumlanrig*.

My Lords, speaking for myself, I could attach no weight to the argument that the rule of common law liability, namely, liability singuli in solidum, is founded upon principle, and that the rule of liability, according to hitherto accepted admiralty practice, namely, the division of the damages equally between two wrong-doers, is not founded upon principle. The only real principle which in such a situation could apply would be that the quantum of damage should be measured and apportioned in the ratio of the quantum of blame. So far, however, has the common law of England diverged from this principle that, if decree have passed upon one of several wrong-doers, he cannot, at least in ordinary cases of negligence, have redress or contribution from the others. *Merryweather* v. *Nixan* (2), relied on as the foundation of this rule, was much discussed in *Palmer* v. *Wick and Pulteneytown Steam Shipping Co.* (3), and Lord Herschell said of it, "I am bound to say that it does not appear to me to be

(1) Lush. 388.

(2) (1799) 8 T. R. 186.

(3) [1894] A. C. 318.

founded upon any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries." It was accordingly not extended to the jurisprudence of Scotland, and in the course of the judgment of Lord Watson he cites with approval the treatise of that philosophical jurist Lord Kames thus: "He discusses the principle of mutual relief between co-cautioners, and points out that the same principles are equally applicable to correi debendi, adding, 'and it makes no difference whether the correi debendi be bound for a civil debt or be bound ex delicto, for in both cases equally it is the duty of the creditor to act impartially, and in both cases equally equity requires impartiality.'" The truth is, that the lack of principle, in the sense which I have indicated, namely, of accurate apportionment, is manifest, not only in the declinature to give proportionate redress in England against a decree for the entirety of damage, but is apparent also at the earlier stages, when the damages come to be fixed. The saddling of one wrong-doer with all the liability for the culpa of more than one,—the common law rule, — and the division of liability equally among two,—the admiralty rule,—are simply the expedients of practical convenience in working out a remedy for a wrong.

In one case, my Lords, arising in Scotland, a strong effort was made in the direction of closer approximation to the apportionment of damage to blame than could be reached by either the common law or the admiralty rule. In the case of *Hay* v. *Le Neve* (1) the Court of Session, upon a report made by the rear-admiral commanding at Leith, Sir John Beresford, from which it appeared that his opinion was that one of two erring ships was much more to blame than the other, apportioned the damages two-thirds against the greater and one-third against the lesser delinquent. In this House that judgment was altered, and damages were given, and the damages were divided equally between the two vessels, Lord Gifford, in the course of a learned and standard judgment, observing, "It might be extremely difficult to regulate the quantum of neglect on the one side and the other, and to apportion the damages by any other rule." This difficulty

(1) 2 Shaw's Scotch Appeals, 395.

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occurs in all cases of divided blame. In the course of his judgment in the present case Fletcher Moulton L.J. observes: "Now the President of this Court seems to think that this admiralty practice is very unjust. For my own part I think that, if you consider the whole question broadly, it is just as likely to do justice in the majority of cases as the doctrine that prevails at common law. But whether it is just or not, Dr. Lushington lays down and I think he rightly lays down that it has become the admiralty practice. He suggests a very plausible reason for it; he suggests that the Court of Admiralty looked upon the two ships as two tortfeasors, and divided the responsibility equally between them so that the owner of cargo recovered one half from one ship, and the other half from the other ship. That certainly is, at least, as just a doctrine as the common law doctrine that there is no contribution between tortfeasors." I desire to state my express concurrence in that observation. One might indeed go further and say that when there has been some blame on each of two delinquents it is juster that each should pay some of the damage than that one should pay none and the other all.

There being accordingly no preference in principle for either the common law rule or the alleged admiralty rule, all that remains in the case is to ascertain whether the latter was a rule in fact and in practice of the Admiralty Courts of England. I venture to agree with the judgment of my noble and learned friend Lord Atkinson upon that subject.

I do not think that the rule started with the judgment of Dr. Lushington in the *Milan Case*. (1) It was affirmed in *Hay* v. *Le Neve* (2), decided in 1824, and applicable not to ship alone, but also to cargo; and the judgment of Lord Gifford takes the admiralty practice back to the year 1789, and to the judgment and important dicta of Lord Stowell to which reference is there made. But, my Lords, the *Milan Case* (1) is important, not because it contains a dictum in the year 1861, to the effect that in the opinion of Dr. Lushington the rule of equal apportionments should apply as well to damage to cargo as to damage to ships, but on account of the decision of that most learned and

(1) Lush. 388. (2) 2 Shaw's Scotch Appeals, 395.

experienced judge, to the effect that the practice of the Admiralty in that sense had been a uniform practice. In that sense he cites many cases unreported, one of which occurred in the Privy Council, in support of his view; but his own experience as a judge of admiralty extended from the year 1838, and his testimony on this point of practice must stand as of unquestioned weight.

I do not myself doubt that the rule has been in constant application, and a convenient instance of the acknowledgment of it is the *Chartered Mercantile Bank of India Case.* (1) As for s. 25, sub-s. 9, of the Judicature Act, 1873, in my opinion "the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law" which are enacted as those which are to prevail, include the rule of liability for damage to cargo or ships at sea, and therefore cover this case.

In so far, my Lords, as any indication appears in the judgments of the Court below for a preference, on the ground of principle, of the common law rule to the rule of the Court of Admiralty, I cannot express any adhesion to such opinions. Nor, indeed, do I think that the terms "arbitrary," "unsuitable," &c., applied to it by the learned judges who pronounced judgment in the *Stoomvaart Case* (2) are more applicable to the one rule than to the other. But as to the practice, in my opinion it would be contrary to the safe administration of justice to upset what has prevailed as a rule of admiralty jurisdiction for over one hundred years.

I have not dealt with the case of *Thorogood* v. *Bryan* (3) and its correction in recent years by the case of *The Bernina* (4) for the simple reason that *Thorogood* v. *Bryan* (3) never was admiralty law. Dr. Lushington would not accept it as admiralty law when it was cited to him in *The Milan* (5), and he treated it as very suspect common law, his suspicions being afterwards amply confirmed. I can accordingly attach no weight to the reversal of a common law rule laid down in *Thorogood* v.

(1) (1883) 10 Q. B. D. 521.
(2) 7 App. Cas. 795.
(3) 8 C. B. 115.
(4) 13 App. Cas. 1.
(5) Lush. 388.

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Bryan (1), when that never was the rule nor influenced the practice of the Admiralty Courts.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 12, 1910.

Solicitors: *Cattarns & Cattarns; Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

[HOUSE OF LORDS.]

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OWNERS OF LIGHTSHIP COMET . . . . APPELLANTS;

AND

OWNERS OF THE W. H. No. 1 . . . . . RESPONDENTS.

THE W. H. No. 1 AND THE KNIGHT ERRANT.

Admiralty—Collision—Tug and Tow—Negligence of Tug—Non-liability of Tow.

A tug was towing a barge at the entrance to the river Mersey on a dark night and was navigated in such a manner that the barge came into collision with a lightship. In an action by the owners of the lightship against the tug and the barge the President held that the tug and the barge were both to blame:—

Held (Lord Robson dissenting), that as a pure question of fact in the circumstances the barge was entitled to expect that the tug would be reasonably well navigated and to act upon that belief, and that the barge was not to blame.

Decision of the Court of Appeal, [1910] P. 199, affirmed.

THE circumstances of this appeal are stated in full detail in the report of the decision of the Court of Appeal (Earl of Halsbury, Fletcher Moulton and Farwell L.JJ.) and are discussed in the judgments of this House. No question of law was argued or decided in this House.

Bailhache, K.C., and *Bateson, K.C.*, for the appellants.

Laing, K.C., and *Robertson Dunlop*, for the respondents.

(1) 8 C. B. 115.

LORD LOREBURN L.C. My Lords, I propose only to deal with the facts of this case, and not with the question of law which was adumbrated but was not argued in the Court below and has not been argued here and is not ruled in any direction by anything which I think your Lordships are disposed to say. It is a question purely of fact.

This barge was towed by a tug right up the river from the bar, and now it is said that the barge, which had no motive power of her own, was jointly responsible. I do not differ from the learned President as to any question of fact, but I do differ as to the inference to be drawn from the facts and as to the burden incumbent upon the persons on board the barge.

If the tug had hard-a-ported after passing the buoy C 3, even when halfway between the *Comet* and the buoy C 3, could she have avoided this collision? Well, it was admitted that she could have avoided the collision. Was it the tug's duty to do this, if she got too far to the eastward, when she was halfway between that buoy and the lightship? It is admitted that it was her duty to do this, if she had not done it before. No doubt she ought to have kept to the westward immediately she passed the buoy; but still, when she had gone halfway, there was plenty of time to retrieve her position and to avoid the collision.

If this be so, was the barge entitled to expect that the tug would be navigated with something approaching to reasonable care? She was entitled to expect that the tug would be reasonably well navigated and to act upon that belief. Was the barge bound to take that step, namely of hard-a-porting, immediately she had passed the buoy, a step which was quite unnecessary if the tug did her duty? I do not think there was any such obligation upon the barge. It is the duty of the barge to do her best under all circumstances to avoid collision, but she cannot be held blameworthy because she does not anticipate and act in advance in expectation of a thoroughly bad piece of seamanship on the part of the tug which is towing her.

Practically the position is this: It was dark; though it was not a bad night it was 8 o'clock at night in the middle of October; the barge could only see the stern light of the tug, and she had only one minute to make up her mind that the tug was pursuing a bad and

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improper course. She was bound to act reasonably; and I think upon the whole of the evidence as stated it is clear that, as soon as she saw that the tug was doing something that was going to bring her into danger, she proceeded at once to hard-a-port, which was exactly the right thing to do; and I think the barge is wholly free from all kind of blame. I may state that the nautical assessors whom we have had the advantage of consulting, from the point of view of seamanship, entirely share that opinion.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I have difficulty in this case owing to a passage occurring in the judgment delivered by the learned President in which he says, "I am advised" (that is to say he was advised by the assessors assisting the Court) "that he" (the man in charge of the tow) "ought in the circumstances to have put his helm hard-a-port before he got to a position midway between C 3 and the lightship. He tells us that when he did put his helm hard-a-port the head of the tow practically failed to answer to the helm at all. He ought, in my opinion, to have foreseen that, and if he had foreseen that he would probably, certainly he ought to, have put his helm hard-a-port long before he did."

My difficulty with regard to that passage, as your Lordships see, is that it proceeded from the learned President upon the advice of the assessors. In this House, my Lords, we have been differently advised, and in these circumstances I am not prepared to differ from the judgment proposed by the Lord Chancellor.

LORD ROBSON. My Lords, I am of opinion that the learned President and those who advised him were correct in the conclusion to which they came. It is one which I have subjected to careful scrutiny with every desire to meet, if it were possible, the views of those who advise your Lordships' House; but I have been unable to do so because upon the evidence that was before the learned President it seems to me that this case is in the result reasonably clear.

What was the duty of the tug and the tow respectively?

First of all, one has to see what were the conditions under which both were operating. The tug had, with a tow following it, to turn the corner which has been identified here as C 3—that is, the position of the buoy bearing that number. For that purpose both vessels would have to port their helms in order to keep well to the westward side of the river Mersey at that spot. They did port their helms. Both rounded the buoy C 3 under a port helm. The moment they rounded the buoy C 3 they both would have the wind full upon their broadside, or very nearly so. It therefore became the duty of each to anticipate that the wind might operate and draw them a little to leeward. That is what actually happened. According to the evidence, the moment the tug had rounded the buoy C 3 on a port helm she began to shew signs of being driven to leeward.

What under those circumstances was the duty of the tow? The duty of the tow was to anticipate that what had happened to the tug would happen in a still greater degree to herself, because the tow was light. It ought therefore to have kept carefully on the safe side of the tug; and keeping upon the safe side of the tug would have been keeping on her starboard quarter, because the lightship which it was desired to avoid was on the port side of the tug. But instead of keeping on the starboard quarter, it is admitted that throughout the whole course between the buoys C 3 and C 4—that is, throughout the whole period when there was risk attending the navigation—the tow consistently kept on the port quarter of the tug instead of keeping on her starboard quarter.

I do not need to ask,—I think it unnecessary to say,—whether the tug was taking a right course or a wrong course. The duty of the tow was to keep on her starboard quarter whether her course were right or wrong. It was her duty to use her steering power so that nothing should take place which might bring her up against the lightship. She never did so, and that seems to me to be a clear and undoubted breach of duty.

The Court of Appeal have said, and, if I may say so with great respect, quite properly that a tow is entitled to assume that the tug will do her duty Of course it is. A tow is entitled to assume that the tug has set a right course and will keep the

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right course or will resume the right course—it is entitled to assume all those things. I do not want to qualify by a syllable the proposition laid down by the Court of Appeal. But it was the duty of the tow to keep behind the tug or to the starboard side of it in the circumstances of the then navigation; and that she never did. When she got midway between C 3 and C 4 she ported her helm. She never answered that port helm, or she answered it only a degree, which, of course, is nothing at all—the eleventh part of a point; but she expected that she would answer it by two or three points. That shews the force of the wind. If, as she herself suggests, it was the wind that prevented her from answering her port helm, the wind must have been very strong. And that emphasizes and intensifies the duty under which she lay the moment she came into the danger which there existed, of the wind driving her to leeward. The moment she came into that danger it was her duty to take steps and to take steps by the means at her disposal of keeping on the safe side of the tug.

That is the short point upon which, as it seems to me, she has failed in her duty—that from beginning to end of the dangerous period of the navigation she was always on the wrong side of the tug when she might have been on the safe side of the tug if she had taken steps in time and taken them efficiently. Therefore, in choosing between the nautical assessors who have successively advised on this case, it seems to me, exercising the best of such judgment as I am able to use, that those who advised the learned President were right in the advice they gave.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, December 13, 1910.

Solicitors: *Rawle, Johnstone & Co., for W. Calthorp Thorne, Liverpool; Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

[HOUSE OF LORDS.]

McDERMOTT (Pauper) . . . . . Appellant; H. L. (E.) 1910

AND

OWNERS OF S.S. TINTORETTO . . . . Respondents. *Dec.* 13.

Employer and Workman—Seaman—Compensation—Mode of Assessment—Liabilities of Employer under Merchant Shipping Acts—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1 (*e*); *First Schedule, par.* 3.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1906, the Act is applied to seamen subject to certain modifications including (*e*), which provides that the weekly payment shall not be payable in respect of the period during which the shipowner is under the Merchant Shipping Acts liable to defray the expenses of maintenance of the injured seaman.

In fixing the amount of the weekly payment paragraph 3 of the First Schedule enacts that "regard shall be had to any payment, allowance or benefit which the workman may receive from the employer during the period of his incapacity . . . ."

The words "any payment, allowance or benefit" must be construed with some limitation. For instance, regard must not be had to payment or discharge of debts due from the employer to the workman, nor (in the case of a seaman) to any payment, allowance, or benefit which under the Merchant Shipping Acts the employer is bound to give, or which is not received in respect of the seaman's incapacity and in respect of that period of incapacity which is covered by the Compensation Act. The meaning is that the seaman is not to be paid twice over by the overlapping of benefits derived from two separate statutes.

A seaman on a voyage abroad was rendered totally incapable by an accidental injury and was placed in a foreign hospital. The shipowners, in accordance with their obligations under the Merchant Shipping Acts, paid him eight days' wages for the interim between the accident and his discharge, also his medical and surgical expenses in the hospital, and made provision for his maintenance and return to England:—

Held, that in fixing the amount of the weekly payment under the Workmen's Compensation Act, 1906, in respect of his continued incapacity in England regard must not be had to the payment of the eight days' wages or of the maintenance and other expenses.

Decision of the Court of Appeal, [1909] 2 K. B. 704, reversed, and decision of the learned county court judge restored.

The circumstances of this appeal are stated in the judgment of Lord Loreburn L.C.

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The learned county court judge held that under paragraph 3 of the First Schedule to the Workmen's Compensation Act, 1906, regard must not be had to the payment of the eight days' wages. This decision was reversed by the Court of Appeal (Cozens-Hardy M.R. and Farwell L.J., Kennedy L.J. dissenting). Hence this appeal.

1910. Nov. 14. *Stewart-Brown* (*H. H. Harding* with him), for the appellant. The question turns upon paragraph 3 of the First Schedule of the Workmen's Compensation Act, 1906. The words "any payment, allowance or benefit" must be construed with some limitation. Taken literally they would include payment or discharge of debts due from the employer to the seaman, statutory debts and common law debts, and every kind of allowance or benefit. If regard were had to them the seaman's compensation might in some cases be seriously and unjustly diminished. They cannot therefore include debts or payments, allowances or benefits, which are imposed on the employer by the Merchant Shipping Acts. They must apply only to voluntary gratuities. In the present case the employer complied with the obligations of the Merchant Shipping Acts, and paid the medical expenses and those incidental to maintenance and to the return to an English port, as well as the wages for the eight days between the accident and the discharge. All those were debts due by statute from the employer to the seaman. The Workmen's Compensation Act, 1906, s. 7, defines the time when the seaman's compensation under the Act is to begin, so that compensation may not be paid twice over for the same thing by the overlapping of two statutes.

Moreover, in order that regard must be had to a payment it must be received by the seaman during the period of incapacity and in respect of that period of incapacity which is covered by the Compensation Act. Here all the payments, allowances, and benefits were received in respect of the period which was not covered by the Compensation Act and were covered by the Merchant Shipping Acts.

The respondents claim only a regard as to the eight days' wages, but their argument must comprise the maintenance and

other expenses paid under the Merchant Shipping Acts, which are on the same footing—obligation.

Sir Robert Finlay, K.C., and *Segar*, for the respondents. In construing a statute the words must be taken in their literal meaning unless the context forbids. Here paragraph 3 is clear and reasonable if the words "regard shall be had," &c., mean that the arbitrator shall consider any payment, allowance, or benefit and either make or refuse to make deductions from the weekly compensation entirely at his own judicial discretion. No difficulty then arises in construing paragraph 3. The one condition is that the benefits must be received during the period of incapacity.

If the words are not to be taken literally many additions must be read into the paragraph, and the difficulties are multiplied. Such a construction is a bad example to set unless it is necessary; and here it is not. There is nothing in the paragraph to justify reading in the words "in respect of the period of incapacity which is covered by the Compensation Act." If the Legislature had intended such a construction surely they would have said so. In any view of the paragraph regard should be had to the eight days' wages, which were gratuitous: the seaman did no work on those days.

The House took time for consideration.

Dec. 13. LORD LOREBURN L.C. My Lords, in this case I agree with Kennedy L.J.

The only facts relevant, in my view, are as follows: McDermott, a seaman on board the steamship *Tintoretto*, broke his thigh by an accident on December 21, 1908. On December 29, 1908, he was discharged and placed in hospital in New York. He sufficiently recovered to bear the journey to England, and arrived in England on March 11, 1909, still incapable of work. The owners of the steamship *Tintoretto* paid him his wages from December 21 till December 29. Also they paid his medical and surgical expenses and maintenance in hospital in New York. They were obliged to pay wages and the rest under the Merchant Shipping Acts. Further, they admit

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their liability to pay him compensation under the Workmen's Compensation Act in respect of his incapacity from March 11, 1909, when he returned to England. But, say the owners, the county court judge, in assessing that compensation, ought to have had regard to the eight days' wages which this man received from his employers between December 21 and 29, and ought to have made some, if only a nominal, deduction accordingly.

Now this contention rests upon paragraph 3 of the First Schedule to the Act of 1906, which runs as follows: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity."

Were not these eight days' wages a payment? say the owners. Was the payment not received from the employers, and during the period of the man's incapacity? All this is undeniably true. And unless your Lordships are prepared to say that the literal words of the Act must suffer limitation, in accordance with precedent, in order to carry out the manifest intention of the Act, the owners will prevail.

Let me, to begin with, take the literal words and see what they would lead to in a wholly unqualified construction. The eight days' wages were undoubtedly a payment. But was not the money paid for this man's maintenance and for medical and surgical relief a "benefit" received by him from his employers?

Obviously it was, and, if so, the county court judge ought to have had regard to the benefit as well as to the payment, and made a deduction for the one as well as the other. The same also if the owners had during the period of incapacity paid to the seaman arrears of wages due long before the accident, or even a sum of money due for breach of contract on an earlier voyage, or almost for any cause you please to name. It would be a "payment" in the literal words of the Act, and so regard must be had to it on fixing the weekly sum to be given as compensation for the incapacity caused by the accident. This last result would, of course, be so preposterous that Sir Robert Finlay was constrained to admit the need of some words to be read into the clause. The payment, allowance, or benefit must,

he argued, be in respect of the incapacity. But that would still entitle the owners to deduct the money spent on maintenance, which is almost equally absurd, because in that view the longer a man had been kept away from England by the consequences of his accident the more he would have to forfeit out of the compensation which begins to become payable when he comes home. It is obvious, and was not disputed at the Bar, that some limitation must be imposed upon these wide words, and the only question is what that limitation should be.

We must, in my opinion, seek for it in the scheme of the two Acts with which this case is concerned. I will present it quite summarily. When a seaman meets with an accident at sea which disables him, he must be paid his wages till he reaches a port where he can be discharged. Further, if he is discharged at a foreign port, the owners must maintain him and furnish him with medical aid till he is able to travel and reaches a port in this country. That is under the Merchant Shipping Acts. Then the Workmen's Compensation Act, 1906, takes up the tale. Before 1906 the seaman was not within the Act. In 1906 the right to compensation for accidental injury was extended to seamen, and begins when the injured seaman ceases to be entitled to maintenance. It is clear that compensation is to begin exactly where the right to maintenance ends. Reading the words of the Act which we have to construe in the light of what I have just said, I have no difficulty in seeing where their generality is limited. It is not every payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity that the county court judge must have regard to. It is only such as are received in respect of the incapacity, and received in respect of that period of it which is covered by the compensation. It means, in short, that the man is not to be paid twice over, by the overlapping of benefits derived from two separate Acts of Parliament.

I feel no hesitation in reading such words into the statute. The same thing has been done by this House before, notably in interpreting the Succession Duty Act in order to avoid a plain absurdity. In this case it is necessary, in order to avoid a plain frustration of the obvious intention of the Legislature.

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EARL OF HALSBURY. My Lords, I am of the same opinion. It appears to me that, as usual, we have slipshod phraseology put into an Act of Parliament, but I think it may be solved by almost one sentence: the payments (I use that word in its strict sense) are not to overlap.

LORD ATKINSON. My Lords, the facts of this case have been stated by the Lord Chancellor with sufficient fulness. The payments made by the respondents to the appellant or for his benefit were by no means gratuities. The respondents were bound to make them under the provisions of the Merchant Shipping Act of 1894 and the amending Act of 1906. [His Lordship stated the provisions of the Merchant Shipping Act, 1894, ss. 155, 158, 159, 160; and the amending Act, 1906 (6 Edw. 7, c. 48), ss. 28, 30, 31, 32, 34, and proceeded as follows:—]

These were the mutual rights and obligations of the appellant and respondents under the Merchant Shipping Acts when he landed in England on March 11, 1909. He then made a claim for compensation under s. 7 of the Workmen's Compensation Act of 1906 in respect of the injury by accident which he had sustained. This statute first extended to seamen the benefits of those Acts. It was admitted that his claim was good, and that he was entitled to compensation, but it was contended on behalf of the respondents that, under the provisions of paragraph 3 of the First Schedule annexed to this statute of 1906, the county court judge, in fixing the amount of the weekly payment payable to the appellant, should have regard, with a view to the reduction of, or deduction from, that payment, to the wages paid to the appellant in respect of the seven days from the 21st to the 29th of December, 1908, when he was on board his ship undischarged, but incapacitated from duty. Though in this case the amount in dispute is small, the principle involved is of considerable importance.

The main, if not the sole, question for decision is whether the contention so put forward is or is not well founded. The county court judge held that the payment of this week's wages to the appellant was wholly irrelevant to the claim made by him under

s. 7 of the statute of 1906, and was therefore not a matter which he, the judge, was bound to have any regard to.

I understand Kennedy L.J. to have concurred in that view. In my opinion they were both right, and their decision is, I think, in accordance with reason and justice. The Workmen's Compensation Act provides that where death does not ensue compensation must be given in the form of weekly payments. The mode in which those weekly payments are to be fixed, the period during which they are to be paid, and the fact that, save in the case of death, a lump sum is not to be given, would go to shew that what is in reality compensated for is the loss of the power of earning, rather than the pain or suffering the workman has endured. As soon as his incapacity ceases and his power of earning is restored, the weekly payments cease.

It would under these circumstances, therefore, appear to be only reasonable and right that, in fixing the amount of the weekly payments, regard should be had, with a view to their diminution, to any payment, allowance, or benefit which the workman should receive from his employer in respect of the injury and the consequent incapacity to earn; else the workman would, in effect, be compensated twice over in whole or in part for the same loss of earning power. Paragraph 3 deals with these latter matters, but the words "in respect of the injury and the incapacity resulting from it" do not occur in that rule, yet they must be implied; otherwise this grotesque result would follow that money due and payable to the workman before the accident happened for wages, money lent, work done, or even damages for breach of contract or tort, should be taken into consideration with the view, admittedly, of reducing the weekly payments. Sir Robert Finlay, as I understood, frankly admitted this. Now, if the weekly sum measured in the manner prescribed, and payable while incapacity continues, be adequate compensation for the loss of the power to earn during that period, it is evident that a seaman who claims under s. 7 does not claim compensation for his entire loss at all. He only claims payment of those weekly sums in respect of the period during which his incapacity shall continue after the liability of the owner under the Merchant

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Shipping Acts to defray the expenses of his maintenance shall have ceased.

Though s. 7, sub-s. (*a*), recognized that the incapacity may commence at the moment of the accident, it confines the weekly payments to that portion of the incapacity's duration which extends beyond the period of the owner's liability for maintenance. On what conceivable ground can this be done, unless it be on the ground that the section has itself made a rough kind of set-off, and treated all the benefits conferred upon the seamen by these Merchant Shipping Acts as equivalent to the weekly payments receivable under the Workmen's Compensation Act during that stage or period of incapacity in the course of which those benefits were received or enjoyed? Maintenance lasts the longest of these. The seaman must be maintained until he is repatriated. If he be then completely cured and able to work he gets nothing whatever under the Workmen's Compensation Act, however serious his injury, or great the pain and suffering he has endured, or prolonged the antecedent incapacity. In this case the first stage of incapacity covered nearly three months. Sir Robert Finlay admits that the loss resulting from the early stage of the incapacity must be treated as compensated for, but insists that it is compensated for, not by all the benefits secured to the seaman by the Merchant Shipping Acts, but by one of them alone, namely, maintenance. But wages, medical attendance and advice, medicines, and the cost of repatriation come within the words of paragraph 3. They are "payments, allowances, or benefits" in as true a sense as is maintenance, and there does not appear in the nature of the thing any reason why a workman, who must, while in health, be paid wages and also maintained, should, if incapacitated by accidental injury of the kind mentioned, be held to be compensated for all loss by being maintained alone.

There does not appear to me to be any warrant for the distinction thus drawn by Sir Robert Finlay. All payments, allowances, or benefits of the kind mentioned, secured to the seaman by these Merchant Shipping Acts, must, I think, be regarded with a view to reduction of the weekly payments, or all be disregarded.

But if all these benefits are to be bona fide taken into consideration with a view to reduction of the weekly payments covering the second period of the incapacity in the manner contended for, and the imperative directions of the Act and rules be not disregarded, then where these benefits are as substantial as they must have been in the present case the weekly payment must be very considerably reduced. For it would be a mere evasion of the statute and rule to pretend to regard them in such a case and then make a nominal reduction in respect of them, or no reduction at all. If, however, this be so, the benefits secured to a seaman by the Merchant Shipping Acts seriously prejudice him.

They first debar him from receiving any compensation for loss sustained during the earlier period of his incapacity, however long; and, secondly, if the Act be honestly administered, they must diminish somewhat, and may diminish considerably, the weekly payments to which he would be entitled during the second period of his incapacity. I cannot but think that such a result would not only be opposed to every principle of justice, but would defeat the very purpose and object of s. 7 of the statute.

In my view the county court judge was not only not bound, but was not entitled, to have regard to any of the benefits mentioned, such as wages paid or maintenance given, simply because they were not received by the appellant during the particular period of his incapacity with which alone the county court judge had to deal, and in respect of which alone he had to fix the weekly payments. They had, I think, served the purpose assigned to them by the statute. They had satisfied the earlier liability of the employer to make weekly payments during the first stage of the incapacity, and were, therefore, matters irrelevant to the claim the county court judge was considering and deciding upon.

By the admission of the respondents the words of the rule cannot be taken literally. It must be construed as if it contained words it does not contain, limiting its reach and generality, and defining to some extent its purpose and operation.

In holding—as I do, that, the cessation of the owner's liability

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for maintenance being fixed by the statute as a new point of departure, as I think it is, "any payment, allowance or benefit" to which regard must be had in the fixing of the weekly payments must be those received within that period of incapacity for and in respect to which alone those payments are to be fixed—I do no violence to the language of the rule comparable to that which must admittedly be done to it to avoid the grotesque results I have already mentioned.

I therefore think the decision of the Court of Appeal was wrong and should be reversed, and that of the county court judge restored, and this appeal be allowed with the costs usual in such cases.

LORD SHAW OF DUNFERMLINE. My Lords, it is unnecessary for me to recapitulate the facts.

By the Merchant Shipping Acts, a seaman who is injured while employed on board a vessel outward bound is entitled to payment of wages until the first port of landing, and of medical expenses and maintenance until he is returned to the port at which he was shipped or to another port agreed to by him. All of these payments are debts due by the employer to the seaman.

By paragraph 3 of the First Schedule to the Workmen's Compensation Act, 1906, it is provided that "in fixing the amount of the weekly payment" of compensation "regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity." The benefits of the Act have been now extended to seamen. In ordinary circumstances the compensation to an injured workman runs from the date of the injury; but, with regard to the special case of seamen, as the employers were under the obligations above mentioned, which subsist till the date of the seaman's being landed in a home port, it is provided that the weekly payment under the Workmen's Compensation Act shall not begin to run in the seaman's case until after that date. Clashing or overlapping of the remedial provisions of the two Acts is thus avoided. Up till the date of landing, the employer must discharge the debts due under the Merchant Shipping Acts; and only for the period subsequent to that date does workmen's

compensation run. When, therefore, the First Schedule dealing with the scale and conditions of compensation uses the language —1 (*b*)—" Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity " shall be paid, that must mean during the incapacity in respect of which a payment by the employer under the Act is due. In the seaman's case such a payment is not due, as stated, until he is landed at the home port. Similarly, when in paragraph 3 the language is used " regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity," there is much to suggest that the very same interpretation must be made, namely, that what is meant is the period of his incapacity in respect of which a payment by the employer under the Compensation Act is due. In the present case no such payment was made. It is unnecessary, however, to decide the case upon that ground.

For, my Lords, in my opinion the expression " payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity " does not cover the discharge or settlement of a debt due to the workman by his employer. The case aimed at by the statute is simple and easily figured. It is the case of a workman injured, but of an interval elapsing between the date of the injury and the award or decree in his favour. That period may be prolonged by litigation, say, to settle points raised by those representing the workman, or, in the more frequent case, by insurance companies representing the employer. During that interval the injured workman's house must, so to speak, be kept over his head, and a considerate employer may not unnaturally desire to give a " payment, allowance, or benefit " to him and his household in the meantime. The meaning of the statute is to secure and encourage an employer so disposed, by making the payment, which is truly a payment by way of allowance or benefit, a proper credit item against the compensation, when it comes ultimately to be assessed. That is what the statute means. But in my opinion it does not mean to make the discharge or settlement of a debt which was due to the workman by the employer enter into the account. It could never be right to give to a

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debtor, who was liable in payment of both and each of two debts, a power to treat the payment of debt No. 1 as pro tanto an extinction of debt No. 2.

My Lords, in the present case the employers propose to put as a debit item against compensation running from March 11, 1909, the payment of a debt due upon December 29, 1908, namely, the payment of the workman's wages due to him by statute and contract on that date. I think such a transaction would be illegitimate and that the words of the Act do not justify it. Such a construction appears to me to twist what was a protection and encouragement to the considerate employer, in making what may justly be treated as advances to an injured workman, into a punishment upon the workman for accepting during his disablement payment of a debt justly due to him as a creditor.

If the words " payment, allowance, or benefit " are looked at by themselves they do undoubtedly cover the payment of debt. I desire to examine this. If the employer owed to his workman a debt of, say, 100*l.*, and were to pay that debt after the injury but before the assessment of damage, it would, I presume, be maintained that, a " payment " having been made, the judge, in striking compensation due to the workman in respect of his injuries, must have regard to this payment in the sense that he must make a deduction from the compensation, or possibly wipe the compensation out. The words, or rather the individual word, of the Act could be appealed to to justify this proceeding. Upon which I observe that I reckon it to be quite unsound, and to be productive of wrong and mischief, to interpret a remedial statute in the spirit of meticulous literalism.

All, I presume, would agree in such an instance as I have ventured to give. But, my Lords, whether the debt be large or small, due for wages, for arrears, or on any ground whatever, does not appear to me to affect the question. I do not think it legitimate to introduce this element into the construction of such a clause. The present is a good instance of the necessity for avoiding such results, and, with regard to the language employed by the Legislature, I see no disloyalty to the text of the statute

in a construction which treats "payment, allowance, or benefit" simply to mean payments by way of allowance or benefit in the sense which I have explained, and to exclude the settlement of debts which were on other grounds due to the workman. The text, if properly construed, seems to be quite apt enough to meet the case aimed at. In my opinion the action of the learned county court judge in disregarding the payment in this case was right and proper.

I agree, my Lords, in the course proposed.

Order of the Court of Appeal reversed and award of Judge Thomas restored with costs here and below: the costs here on the pauper scale.

Lords' Journals, December 13, 1910.

Solicitors: *Windybank, Samuell & Lawrence, for Fox & Bradley, Liverpool; Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

[HOUSE OF LORDS.]

(SITTING DURING DISSOLUTION.)

THE KING . . . . . APPELLANT;

AND

WILLIAM HENRY BALL . . . . . RESPONDENT.

THE KING . . . . . APPELLANT;

AND

EDITH LILIAN BALL . . . . . RESPONDENT.

Criminal Law (Appeal) — Incest — Evidence to prove previous Relations — Admissibility — Punishment of Incest Act, 1908 (8 *Edw.* 7, *c.* 45), *ss.* 1, 2— *Conviction quashed — Appeal to House of Lords — Application to Attorney-General for Certificate — Power of Court as to Custody of Defendant — Reversal of Order of Court of Criminal Appeal — Power of Court to restore Conviction — Practice of the House of Lords — Printing Papers — Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 1, *sub-ss.* 6, 7; *s.* 4, *sub-s.* 2, *and s.* 9.

There being no rules of the House of Lords in respect of criminal appeals, the House on presentation of such an appeal will order the same to be read and prosecuted subject to such standing orders as may be

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applicable thereto and to the requirement that the respondent to such an appeal shall "lodge a case forthwith in answer thereto"; and the House will accept typewritten copies of the papers necessary to the disposal of the appeal, the petition of appeal alone being printed.

The defendants, who were brother and sister, were indicted under the Punishment of Incest Act, 1908, for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution to the effect that, at the times specified in the indictment, the defendants were seen together at night in the same house, which contained only one furnished bedroom; and that there was in the bedroom a double bed which bore signs of two persons having occupied it. The witnesses for the prosecution were not cross-examined. The prosecution then tendered evidence of previous acts of the defendants with the view of shewing what were the relations between them. This evidence was objected to, but was admitted. The evidence was to the effect that the male defendant in November, 1907, took a house to which he brought the female defendant as his wife; that they lived there as husband and wife for about sixteen months; that at the end of March, 1908, the female defendant gave birth to a child, and that she registered the birth, describing herself as the mother and the male defendant as the father. The defendants having been convicted, they appealed, and the Court of Criminal Appeal quashed the conviction and directed a "judgment and verdict of acquittal to be entered," on the ground that the evidence objected to was not in the first instance admissible, and that nothing had occurred in the conduct of the defence to render it admissible as evidence in rebuttal:—

Held, by the House of Lords, reversing the order of the Court of Criminal Appeal, that the evidence objected to was admissible on the issue; for the object of that evidence was to establish that the defendants had a guilty passion towards each other and to rebut the defence of innocent association as brother and sister.

Held by the Court of Criminal Appeal, that the Court has no power to hold a defendant, whose conviction has been quashed, to bail or to keep him in custody pending an application by the Director of Public Prosecutions or the prosecutor to the Attorney-General, under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, for his certificate that the decision of the Court involves a point of law of exceptional public importance and that it is desirable that a further appeal should be brought to the House of Lords, or pending an appeal if the certificate is granted.

Held, also, by the Court of Criminal Appeal, that the Court had power to give effect to the decision of the House of Lords by making an order dismissing the original appeal against the conviction and restoring the conviction, and to issue a warrant for the arrest of the defendant who had been discharged from custody.

APPEALS from an order of the Court of Criminal Appeal dated November 8, 1910, brought by the Director of Public Prosecutions

(on behalf of His Majesty) and with the consent and certificate of the Attorney-General, against the defendants (the respondents) William Henry Ball and Edith Lilian Ball.

The defendants were tried on October 14, 1910, before Scrutton J. under the Punishment of Incest Act, 1908, upon an indictment charging in the first count that the defendant William Henry Ball on a day between July 1 and 14, 1910, to the jurors unknown (1) unlawfully had carnal knowledge of Edith Lilian Ball, who was to his knowledge his sister; and in the second count that the defendant Edith Lilian Ball on the day above mentioned, being then above the age of sixteen years, to wit, twenty-three years of age, unlawfully and with her consent permitted William Henry Ball to have carnal knowledge of her, she then well knowing him to be her brother. There were two other counts charging a similar offence on September 20, 1910.

The defendants were brother and sister. The prosecution called evidence to the effect that on September 13, 1909, a letter, which was identified as being in the male defendant's handwriting, was received by a house agent from a Mr. W. Ball with regard to taking a house; that in that letter the male defendant wrote "I have only one in family and am likely to stop at that, I would very much like to come out and see you personally but my hours of business are so that I can't get to your office until it is closed, but should you be calling my way my wife would be very pleased to interview you on the subject or I could get her to call on you"; that the house was let to him in October, 1909; that during the first two weeks of July, 1910, observation was kept upon the house by the police, and that the defendants were seen on more than one occasion leaving and entering the house; that on the evening of July 7 they were seen in the house, and that a light in the kitchen was extinguished, and a minute or two afterwards a light was seen in the front bedroom; that on the evening of July 12 the defendants were seen to go into the house; that at 10.15 P.M. a light which

(1) The indictment as drawn alleged the offence charged in the first and second counts to have been committed on July 12, 1910, but at the suggestion of the learned judge the date was amended at the trial as above.

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was in the kitchen went out and a light appeared in the front bedroom and remained alight for about half an hour, during which time the windows were open and a man and a woman were heard in conversation together; that at about 11.20 P.M. on September 20 the police knocked at the door of the house, which was opened by the female defendant, who was wearing a nightdress; that she went upstairs and one of the police followed her and saw the male defendant coming from the front bedroom fastening up his trousers, with his shirt on, but no socks; that there was a double bed in the front bedroom with bedding upon it which bore signs of two persons having occupied it; that there was only one other bedroom in the house, the bedstead in which, however, had no bedding of any kind upon it. There was also a female child about two and a half years old in the room. The police found in the sitting-room a letter in the male defendant's handwriting, dated September 19, 1910, the day before the arrest. That letter was as follows:—

"My own dearest Edie just a few hasty lines to let you know am alright, hoping you are the same and dear little Con's cold is better, if not, don't hesitate to take her to a doctor if you think it necessary. Finished to late to get home shall be down the usual time tomorrow dearest. Beastly cold up here tonight shall shut up now and go to bed. So good night my angels

"From your ever loving

"Will. × × × ×

"Con's × × × ×"

None of the witnesses were cross-examined.

The prosecution then tendered evidence of previous acts of the defendants with the view of shewing what were the relations between them. This evidence was objected to on behalf of the defendants. The judge at the trial sent the jury out of Court, while the admissibility of the evidence was argued, and after hearing argument delivered the following decision:—

SCRUTTON J. I think I had better say what my general ruling is before I bring the jury in.

This is a question of considerable difficulty on which it seems to me I do not get very much light from the cases that have been

cited to me—*Rex* v. *Ellis* (1), *Reg.* v. *Rearden* (2), *Rex* v. *Chitson* (3), and others. The facts stand in this way. The two prisoners are being tried for two specific acts of incest on two specific dates in 1910—one in July and the other on September 20. Evidence is given from which the jury may infer that on each of those dates they were occupying the same bedroom. It might be a question for the jury whether from that fact alone they would draw the inference of intercourse or not. But the prosecution, in view of the fact that it may be said that occupying the same bedroom is not evidence of intercourse on that particular date, desire to give evidence of previous acts of intercourse shewing a relation akin to that of husband and wife. It is objected that evidence of that kind is not admissible, firstly, because at the time such acts were committed it was not an offence according to the law of the land to have intercourse with one's sister; secondly, because evidence of previous acts of a similar class is not admissible in this case, which does not fall within any of the heads under which evidence of such acts is admitted.

The course I propose to take is to admit the evidence, when the point can be raised in the Court of Criminal Appeal if it is desired, and the reason for which I admit the evidence is this.

Two classes of cases in which such evidence is admissible seem to be fairly clear. First, when the evidence tendered explains the intent with which the prisoner does the particular act with which he is charged it is admissible. Second, when the evidence tendered is in the view of the Court part of the same transaction it is admissible; and *Reg.* v. *Rearden* (2), which has been cited to me, seems to come under that head. The question is, does the principle go further? Supposing that the acts proved are ambiguous, is it open to give evidence of other acts to explain what the relations existing between the parties were at the time? To shew with what intent A. and B. were occupying the same bedroom may the prosecution give evidence that they have had a series of children in past years while occupying the same bedroom and living together as husband and wife? I am not sure that any authority has gone as far as this, although I

(1) (1826) 6 B. & C. 145. (2) (1864) 4 F. & F. 76.
(3) [1909] 2 K. B. 945.

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think the case of *Makin* v. *Attorney-General for New South Wales* (1) goes a very long way towards it. But I am of opinion that evidence of previous acts would be admissible to explain the relation in which two parties are found which has to be interpreted by the jury. I do not like to use the word "scheme," although that word is used; but I think relation is the word which best expresses the principle which I wish to convey.

I only wish further to say that as I understand the case of *Makin* v. *Attorney-General for New South Wales* (1) it does involve very much the same principle. In that case the prisoner was being tried for the murder of a child, and what was proved was that he had received the child from the mother for a very small sum, and that its skeleton was found in his back garden. Now those facts in themselves are consistent with death by an ordinary disease and irregular burial, or they are consistent with murder to get rid of the child and to take advantage of the sum received for its maintenance. It was proposed to tender evidence that a number of other skeletons had been found in the back garden of a previous residence of the prisoners, and that a number of other children had been entrusted to the prisoner also for inadequate sums, and that all those children had disappeared. I do not think that that evidence was given to shew intent, because the first thing to shew was not intent, but that the prisoners had done the act at all, that they had actually killed the child; it was not till they killed the child that the question of the intent with which they did it arose, and I think that that evidence must have been given to enable the jury to draw the proper inference as to the sort of business or transaction that the prisoners were carrying on, of which the disappearance of this particular child was one incident. From proving the sort of business carried on to proving the relation of the parties seems to me a very small step.

Without deciding on the admissibility of any particular question, and leaving Mr. Forrest Fulton to object to any particular question, I propose generally to admit evidence explaining the previous relations between the parties, in order to enable the jury to draw the proper inference from the

(1) [1894] A. C. 57.

facts proved as to the two particular dates on which the offence is charged. That is the general principle I lay down, and we will now proceed with the case, leaving Mr. Forrest Fulton, if he thinks fit, to object upon any particular point which may or may not be covered by the general principle I have explained.

The evidence was then given and was to the effect that in November, 1907, a house at Walthamstow was let to the male defendant; that about a fortnight afterwards he brought the female defendant to the house and introduced her to the landlady as his wife, and that they lived there for about sixteen months as Mr. and Mrs. Ball; that there was only one furnished bedroom in the house which was occupied by the defendants; that they were on one occasion seen in bed together; that on March 27, 1908, the female defendant gave birth to a girl, and that she registered the birth, giving her own name as that of the mother and William Ball as the name of the father, the name of the child being stated to be Constance Edith. Evidence was also given that the male defendant, who was a married man, in May, 1909, brought a little child, named Constance Edith, to the house where his wife was living, and that in August, 1909, he brought the female defendant there, and his wife left at the end of three or four days.

The jury found the defendants guilty, and the learned judge certified that the case was a fit case for appeal under s. 3 (*b*) of the Criminal Appeal Act, 1907 (if leave was necessary), stating that the question to be raised was as to the admissibility on a trial for acts of incest on specified days in 1910 of evidence of previous relations between the parties from 1907, including acts of sexual intercourse resulting in the birth of a child in 1908.

The defendants appealed to the Court of Criminal Appeal.

1910. Oct. 31. *Forrest Fulton*, for the defendants. The charge against the defendants is that they had carnal knowledge of each other on two days in 1910. Evidence of former acts of sexual intercourse is not admissible for the purpose of shewing that the defendants were likely from their criminal conduct or character to have committed the offence charged against them. It is, however, admissible where it is relevant to an issue

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before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused: *Makin* v. *Attorney-General for New South Wales.* (1) There was no question here as to whether the acts charged in the indictment were designed or accidental. Nor had the witnesses for the prosecution been cross-examined for the purpose of shewing that the relations between the defendants were those merely of brother and sister. To make the evidence admissible as rebutting a defence which would otherwise be open to the accused the defence must have been put forward or must be intended to be relied upon by the accused: *Rex* v. *Bond.* (2) In that case Bray J. specifies the three heads under which such evidence is admissible (3), and this case does not come within any of them. *Rex* v. *Allen* (4) did not decide that, upon a charge of incest, evidence of previous incestuous acts was admissible; it only decided that the admission of such evidence in that case had not caused a substantial miscarriage of justice. The evidence objected to was therefore wrongly admitted, and apart from it no jury could reasonably have convicted. The conviction ought therefore to be quashed. [He also referred to *Rex* v. *Chitson.* (5)]

Graham-Campbell, for the prosecution. The law of evidence is the same in civil as in criminal cases: per Wills J. in *Rex* v. *Mean* (6); and evidence which is relevant to the issue before the jury is admissible though it may prove that the prisoner has committed another offence: *Rex* v. *Fisher.* (7) The evidence here is admissible to shew the relations between the defendants —Stephen's Digest of the Law of Evidence, 6th ed., art. 9— and thus to shew what inference the jury ought to draw from the defendants' acts and conduct on the dates specified in the indictment; the inference, as Bray J. said in *Rex* v. *Allen* (8), that might be drawn from continuous living together. In America, upon a charge of incest, previous acts of sexual intercourse and

(1) [1894] A. C. 57, at p. 65.
(2) [1906] 2 K. B. 389, at p. 409.
(3) Ibid. at p. 414.
(4) (1910) 4 Cr. App. Rep. 181.
(5) [1909] 2 K. B. 945.
(6) (1904) 21 Times L. R. 172.
(7) [1910] 1 K. B. 149.
(8) 4 Cr. App. Rep. at p. 186.

familiarity are admissible in evidence: 1 Wigmore on Evidence, ss. 398, 399, 400 (where all the cases are collected); *The People* v. *Jenness*. (1) So also upon an indictment in the State of Vermont for adultery on a particular date evidence of other acts of improper familiarity and adultery between the same parties continuing from before until after the offence charged was held admissible in order to shew the true relations of the parties to each other: *State* v. *Bridgman*. (2) In proceedings for divorce evidence of acts of adultery subsequent to the date of the petition is admissible for the purpose of shewing the nature and quality of the previous acts: *Boddy* v. *Boddy* (3); *Wales* v. *Wales* (4); *Thayer* v. *Thayer*. (5) The same rule was applicable to an action of crim. con.: *Duke of Norfolk* v. *Germaine*. (6) The evidence here shewed that the defendants were continuously living together since November, 1907. If this evidence is not admissible, it will be almost impossible to prove a charge of incest under the Punishment of Incest Act, 1908. The evidence is admissible upon the principle stated in *Makin* v. *Attorney-General for New South Wales* (7), namely, to rebut the defence that the relations between the defendants were innocent. [*Borham* v. *Borham* (8) was also referred to.]

Cur. adv. vult.

Nov. 8. The judgment of the COURT (Darling, Pickford, and Lord Coleridge JJ.) was read by

DARLING J. William Henry Ball and Edith Lilian Ball were tried on October 14, 1910, before Scrutton J. at the Central Criminal Court on an indictment charging W. H. Ball with having had carnal knowledge of E. L. Ball, and charging E. L. Ball with permitting him to have carnal knowledge of her, they being to their knowledge brother and sister. The offence was charged as having been committed (1.) on a day between July 1 and July 14, 1910; (2.) on September 20, 1910.

(1) (1858) 5 Mich. 305.
(2) (1876) 49 Verm. Rep. 202.
(3) (1860) 30 L. J. (P.) 23.
(4) [1900] P. 63.
(5) (1869) 101 Mass. Rep. 111.
(6) (1692) 12 How. St. Tr. 927, at col. 945.
(7) [1894] A. C. 57.
(8) (1870) L. R. 2 P. & M. 193.

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The question therefore was, not whether the defendants were living together generally in the relation of husband and wife, but whether they in fact had carnal knowledge of one another on the particular days charged.

Evidence was given to shew that the two prisoners lived together during the period mentioned in the first and second counts, and also on the day mentioned in the third and fourth counts, with a female child, in a house containing only one furnished bedroom, and that they slept together in the same bed. The two prisoners were brother and sister. Evidence was tendered against both prisoners to shew that in November, 1907, the male prisoner brought the female prisoner to a house at Walthamstow, that they occupied the same bed there, that the male prisoner called the female prisoner his wife, and that in March, 1908, the female prisoner was confined of a female child. Evidence also was tendered as against the female prisoner to shew that she registered the birth of the child, giving her own name as that of the mother and the name of the male prisoner as that of the father. This evidence was admitted. The question is whether this evidence was rightly admitted, and in order that the decision of this Court might be taken Scrutton J., who presided at the trial, gave leave to appeal, without expressing any opinion as to whether leave was necessary.

The Punishment of Incest Act, 1908 (8 Edw. 7, c. 45), under which these proceedings were taken, came into operation on January 1, 1909. The principle of the law is clear. The difficulty lies in its application. Was this evidence or was it not relevant to the proof of the offence charged? The fact that incest was not a crime in 1907 and 1908 does not affect the relevancy of the evidence. If it was relevant, it was admissible whether or not it involved proof of a former offence.

It is a clear principle of law that the prosecution cannot give evidence of former offences or acts committed by the accused in order merely to shew that the accused is likely to have committed the offence or act charged in the indictment. On the other hand the prosecution may give such evidence in order to shew intent, guilty knowledge, design, system, or to rebut the defence of accident, mistake, or reasonable or honest motive,

and the like. Or where several transactions are so connected as to form one transaction, the others may be proved in order to shew the character of the transaction impeached. This doctrine has been clearly and briefly defined by Bray J. in *Rex* v. *Bond* (1), where he says: "A careful examination of the cases where evidence of this kind has been admitted shews that they may be grouped under three heads: 1. Where the prosecution seeks to prove a system or course of conduct. 2. Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake. 3. Where the prosecution seeks to prove knowledge by the prisoner of some fact." We think that the law may be thus briefly summarized. Evidence that a similar act was committed before is not evidence of the commission of the act on the day charged. Such evidence can only be receivable to shew the mens rea in the doing of such act. If on the facts of this case an act of intercourse was proved, no question could arise as to the mens rea with which the act was done, for the statute forbids the act as in itself criminal. If without the admission of the disputed evidence the fact of the two accused persons occupying the same bed on the date or dates charged was insufficient proof that intercourse took place between them on that date or those dates, then the fact that intercourse took place between them on former occasions could only be tendered to shew that they were persons likely to have intercourse on the particular dates—a ground on which evidence is not receivable. It would be tendering evidence of the former commission of similar acts, not to shew the mens rea with which the act was committed, but to shew the commission of the act itself. We are of opinion that such evidence is not receivable.

The learned judge admitted this evidence on the ground that it went to explain the relations in which the accused persons were found; but, as we have already pointed out, the question for the jury was not what were their relations, e.g., that of husband and wife, but did they have carnal knowledge of one another on the day or days charged; and it is not admissible to attempt to prove that crime by shewing that it is likely because the accused had committed a similar act some two years before

(1) [1906] 2 K. B. 389, at p. 414.

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Moreover the mere prolongation of the relations renders the commission of the offence on any given day less likely.

We think therefore that this evidence could not have been admitted in the first instance, and we are of opinion that at the time when it was admitted nothing had occurred in the conduct of the defence to render it admissible as evidence in rebuttal. The appeal must therefore be allowed.

Graham-Campbell, for the prosecution. The Director of Public Prosecutions, when he has had an opportunity of considering the judgment of the Court, may wish to apply to the Attorney-General for his certificate, under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable that a further appeal should be brought so as to enable him to appeal to the House of Lords. The question thus arises as to the position of the defendants pending such an application and pending an appeal, if the certificate is obtained, to the House of Lords. No rules of procedure have been made under the Act dealing with appeals to the House of Lords. By s. 4, sub-s. 2, of the Act, "Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered." Sect. 1, sub-ss. 6 and 7, are amongst the special provisions of the Act. By s. 1, sub-s. 6, subject to an appeal upon the Attorney-General's certificate to the House of Lords "the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that Court to any other Court." Therefore the decision of this Court is not to be final in the event of an appeal to the House of Lords. By sub-s. 7, "The Court of Criminal Appeal shall be a superior Court of record, and shall, for the purposes of and subject to the provisions of this Act, have full power to determine, in accordance with this Act, any questions necessary to be determined for the purpose of doing justice in the case before the Court." The Court may have power under those sub-sections to hold the defendants to bail or to keep them in custody pending

an application to the Attorney-General for his certificate, and, if the certificate is granted, pending an appeal to the House of Lords; or to postpone the formal drawing up of the judgment of the Court pending the application and the appeal, and to admit the defendants to bail in the meantime or to keep them in custody. Sect. 14, sub-s. 2, gives the Court power to admit an appellant to bail "pending the determination of his appeal." That may only apply to the defendants' appeal to this Court.

The defendants were not represented by counsel.

The judgment of the COURT (Lord Alverstone C.J., Darling and Pickford JJ.) (1) was delivered by

LORD ALVERSTONE C.J. This application raises an important point, which comes before this Court for the first time. In our judgment the language of the Criminal Appeal Act, 1907, is not sufficient to enable us to direct a successful appellant to remain in custody or to be held to bail. Sect. 4, sub-s. 2, of the Act provides that "Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered." It is said that the special provisions of the Act contained in s. 1, sub-ss. 6 and 7, to which I will call attention later on, enable us to take the course suggested. In our opinion they are not sufficient. We are dealing with a very important matter, namely, the liberty of the subject and the power to impose upon the defendants, whose convictions have been quashed, either the obligation of finding bail or of being kept in custody. It must be remembered that the Act gives the Court no power to grant a new trial. The opening words of s. 4, sub-s. 2, are required for another purpose, because by s. 5, sub-s. 2, special power is given to the Court to enter another conviction and to award another punishment, and so to make an order which does not involve a judgment and verdict of acquittal, although the particular conviction may be quashed. It seems to us that where a conviction is quashed express words would be required to give us power to hold the defendants to bail or to keep them in custody.

(1) Lord Coleridge J. was absent on circuit.

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It is said that something of this kind must have been contemplated when s. 1, sub-s. 6, of the Act was framed, and that under that sub-section, taken with sub-s. 7, we have power to make such an order. Now when the object of sub-s. 6 is considered that contention fails. Sub-s. 6 deals not only with the case of a particular appellant but also enables the decision of this Court upon a point of law of exceptional public importance to be reviewed by the House of Lords. It is to be observed that the sub-section does not give the Attorney-General power, in any case in which he thinks fit so to do, to direct an appeal to the House of Lords—a power which, having regard to the many other powers which the Attorney-General possesses, it would not be unreasonable to give to him. The words of sub-s. 6 are: "If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords." That, in our opinion, confirms the view that the sub-section was inserted not so much with the object of deciding the particular case before the Court, either by affirming the conviction or by directing an acquittal, as with the object of obtaining the decision of the highest tribunal in the country upon a point of law of exceptional public importance. Without presuming in the least to suggest to the Attorney-General what his duties are, it is obvious that what he has to consider is not merely, if indeed at all, the question whether there ought to be a conviction or acquittal in the particular case, but also whether the decision of the Court involves a point of law of exceptional public importance. In our opinion we ought not to construe the words of that sub-section as giving us power to hold to bail or to keep in custody persons who are, upon the judgment of this Court, declared to be unconvicted persons. The Attorney-General may after considering the matter refuse to give his certificate, or may take some time before he comes to a decision upon the matter, and how can it be said that this Court has power during that intermediate time to hold a person whose appeal has been

successful to bail or to keep him in custody? The order, therefore, must issue that the conviction be quashed, and we can make no order with regard to the holding to bail or detention of the defendants.

Conviction quashed. (1)

W. F. B.

In November, 1910, the appeals to the House of Lords were lodged, with the certificate of the Attorney-General (see note at end of report) embodied therein, and, there being no rules of the House of Lords in respect of criminal appeals, the Law Lords were consulted, and on November 28, 1910, it was ordered (2) That the appeals lodged by the Director of Public Prosecutions be read and that the same be "ordered to be prosecuted subject to such standing orders as may be applicable thereto," and the respondent in each appeal be ordered "to lodge a case forthwith in answer thereto."

The House also gave notice to both sides to appear at the Bar on the following day and instructed the Director to give personal notice to the defendants.

Nov. 29. *Graham-Campbell,* for the appellant. The appellant asks for directions under circumstances which are entirely novel, this being the first appeal to the House under the Criminal Appeal Act, 1907. (3) The Director thinks it desirable that the case should be fully argued, and, the Attorney-General having certified that "a point of law of exceptional public importance" is involved, is desirous of arguing this case at the Bar himself. On the other hand the Director

(1) The order is given p. 77, post.

(2) *Lords' Journals,* November 28, 1910.

(3) Sect. 1, sub-s. 6, of the Criminal Appeal Act, 1907, enacts: "If in any case the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto, the determination by the Court of Criminal Appeal of any appeal or other matter which it has power to determine shall be final, and no appeal shall lie from that Court to any other Court."

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has been arranging that the two respondents, although they have already the able assistance of Mr. Forrest Fulton, should have further assistance for the purpose of placing their views before the House in the fullest possible way; he asks therefore that a day may be fixed for the hearing. He has further to ask whether the documents which have been filed in the House are sufficient. No rules have been made as to these appeals to this House, nor are there any standing orders applicable to appeals from the Court of Criminal Appeal to this House. All the documents which were before the Court of Criminal Appeal have been filed, and in addition there are the petition of appeal embodying the certificate of the Attorney-General and the transcript of the judgment of the Court of Criminal Appeal. (1)

The point of law to be argued appears in the certificate granted by Scrutton J., who tried the case, and is as follows:—

"The question to be raised is as to the admissibility on a trial for acts of incest on specified days in 1910 of evidence of previous relations of the parties from 1907, including acts of sexual intercourse resulting in the birth of a child in 1908."

Forrest Fulton, for the respondents, agreed that all the papers necessary for the decision of the appeal were before the House.

LORD LOREBURN L.C. We will say December 15 next for the hearing. In regard to the papers, I imagine what we want is the materials which were before the Court of Criminal Appeal, and we need not put the parties to the expense and trouble of printing. (2)

(1) The following is the list of documents filed and deemed sufficient in these appeals:—(1.) Printed petition of appeal to the House of Lords embodying the order appealed from, and the certificate of the Attorney-General (see note at the end of this report); (2.) copy of depositions; (3.) copy of exhibits; (4.) lists of exhibits; (5.) the indictments; (6.) transcript of proceedings, including the evidence and the argument at the trial before Scrutton J.; (7.) notice of appeal; (8.) certificate of Scrutton J.; and (9.) transcript of the judgment of the Court of Criminal Appeal. All were typewritten except the first.

(2) The practice on writs of error in ancient times, some of which involved criminal issues, did not require, as in ordinary appeals to the House of Lords, that printed cases should be lodged on every writ of error. Where the question raised was short and clear the House heard the cause immediately and dispensed with printed

The EARL OF HALSBURY, LORD ALVERSTONE C.J., and LORD GORELL concurred.

Dec. 15. *Sir Rufus Isaacs*, *A.-G.* (*R. D. Muir*, *S. A. T. Rowlatt*, and *Graham-Campbell* with him), for the appellant. If the Court of Criminal Appeal is right in holding that under the circumstances all the Court can do is to look to the particular act which is charged, and that evidence cannot be received of the guilty desire which had existed and of opportunity of gratifying that desire, the result will be that in these cases it will be impossible to prove incestuous intercourse, just as in the Divorce Court it is generally impossible to prove adultery by ocular proof. The evidence establishes beyond doubt that the expression "my wife" in the letter of September 13, 1909, refers to the male defendant's sister Edith Ball. Another important document is the letter of September 19, 1910. The envelope shews that it was addressed to "Mrs. E. Ball." That letter was found in the house. Where the relationship of brother and sister exists, proof that they live in a room together, or even occupy the same bed, may not be sufficient evidence for the jury of their guilt. The jury may be unable to draw the inference that in the circumstances there has been sexual intercourse; but when superadded there is proof of a sexual passion existing between them—for it is only by the admission of that evidence that one can arrive at what were the real relations between the persons accused—the jury are enabled to draw the proper inference. Therefore here the evidence of previous relations was tendered on the ground that it was relevant to the issue. Where evidence is capable of both an innocent and a guilty construction the prosecution is entitled to prove such facts as go to shew that in the particular case the inference ought to be drawn that the act was a guilty and not an innocent one.

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cases on either side: *Houldditch* v. *Houldditch*, July 5, 6, 12, 1815, *Lords' Journals*, vol. 50, 379, 393, 411; and Macq. Prac. House of Lords, 413. Another difference is that an ordinary appeal *must* be signed by two counsel; this petition of appeal was accepted with the signature of one, namely that of the Attorney-General, which appeared on his certificate. It is presumed that if the petition was lodged by a defendant the same rule would apply.

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In the case of a female, consent is a necessary ingredient of the offence, and the prosecution must be entitled, in order to establish that the act charged was done with her consent, to prove that she has had intercourse with the same person on previous occasions.

The general rule is very clear. If the evidence tendered is merely to shew that the person accused is of evil disposition, it is clearly irrelevant. If it shews that the act for which he is indicted has been committed it is clearly admissible. Evidence of intercourse by the prisoner with another sister would not be admissible, but on the question whether under particular circumstances he has committed the offence with this particular person, proof that he had a guilty desire and had previously gratified his passion with that person would be relevant, to rebut the suggestion that what was proved with regard to the particular occasion was consistent with absence of the sexual intercourse between the brother and sister charged in the indictment.

[LORD LOREBURN L.C. If letters of an amatory or indecent character could be admissible in a case of this description for the purpose of shewing the existence of a guilty passion, would the fact that they shew that the passion had been previously gratified prevent them from being admissible ?]

It would not. The mistake the Court of Criminal Appeal has made was in coming to the conclusion that the object of the evidence was to prove that the person accused was of criminal disposition. The opinion of Lord Herschell L.C. in *Makin* v. *Attorney-General for New South Wales* (1) clearly covers this case. John Makin and Sarah Makin were charged with child murder, and evidence was admitted there to shew that these persons had received at another house children at a small remuneration, and that those children had disappeared, and that their bodies were subsequently found buried in the garden. The question arose on the appeal whether that evidence was properly admitted. It was contended that it was not relevant to the charge. Lord Herschell L.C. in delivering the opinion of the Court said: "There can be no doubt in their Lordships'

(1) [1894] A. C. 57, 64—68.

opinion that there was ample evidence to go to the jury that the infant was murdered. Indeed, that point was scarcely contested in the argument for the appellants. The question which their Lordships had to determine was the admissibility of the evidence relating to the finding of other bodies and to the fact that other children had been entrusted to the appellants. In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." The prosecution rely upon the last proposition. It is a statement of the law sufficiently wide to cover every possible case in which it is necessary to give evidence to rebut an inference which might otherwise be drawn from facts proved which are capable of either an innocent or guilty interpretation. Where Lord Herschell L.C. says " whether the acts alleged to constitute the crime charged in the indictment were designed or accidental " he is referring to common instances, in which a jury is asked for the defence to infer that the particular facts proved are quite consistent with mistake or accident on the part of the person accused. The prosecution is entitled for the purpose of rebutting that defence to prove facts which negative any such inference. The Court of Criminal Appeal did not throw any doubt upon the ruling of Lord Herschell, but it wrongly applied the principle. The law of evidence is the same in all our Courts, and there is no distinction to be drawn as to what is evidence in a civil case or in a criminal case, except where the

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matter is regulated by statute or by principles applicable only to criminal law.

[LORD LOREBURN L.C. The evidence in question appears to have been tendered to support the inference from their sleeping together that the defendants were guilty of the offence charged, and to rebut any suggestion that it was consistent with innocence.

LORD ALVERSTONE C.J. In the administration of this Act there is an additional reason which enforces what you have said, namely in the case of poor people in crowded dwellings. It is sometimes impossible for them to avoid sleeping together, and it would be wrong to assume in some cases that there must have been incestuous intercourse because persons of different sexes were in the same bed. It is therefore important, in the administration of this Act, to know whether this evidence is admissible or not.]

The following authorities support the argument for the prosecution: *Rex* v. *Watson* (1); *Rex* v. *Burdett.* (2) And in the Divorce Court similar evidence has been admitted over and over again. In the case of *Duke of Norfolk* v. *Germaine* (3), an action for criminal conversation where the issue was adultery, the defendant pleaded not guilty within six years. Holt C.J. said, "You have not proved any lascivious conversation within these six years." Then the Solicitor-General said, "This is the use we make in giving in evidence some things before, to shew the fact within the six years, their frequent meeting in a lascivious manner; and we make use of that before the sixth year, to explain what use we make of it in matters done within the six years." Holt C.J. admitted the evidence and said, "The defendant pleaded, That he did not commit anything within these six years: what hath been before, is not now to be taken notice of. But the plaintiff's counsel hath given in evidence some acts before, which is not for any damage they expect, but to explain some actions that have been between them. For my part, I must declare, that these matters may be given in evidence to explain, but they are not to be given in evidence to any other purpose." That is exactly the point taken

(1) (1817) 2 Stark. 116, at p. 155.
(2) (1820) 3 B. & Ald. 717.
(3) 12 How. St. Tr. 927, at cols. 944, 945.

by the Crown. [He also referred to *Weatherley* v. *Weatherley* (1) and, as shewing that evidence of adultery subsequent to the date of the petition may be admitted, to *Boddy* v. *Boddy* (2) and *Wales* v. *Wales and Cullen.* (3)]

[He was stopped.]

Holman Gregory, K.C., and *Forrest Fulton* (*Eustace Fulton* with them), for the respondents. The offence charged in the indictments is that of having actual carnal knowledge. It is not living together as husband and wife. In some cases proof of the objective act or physical act is sufficient proof of a crime. There is another class of cases where two material facts must be proved, first the act, and then the mind of the person who commits the act, as in arson, murder, false pretences, or fraud. To prove the act direct evidence must be given as to what happened at the time the offence is charged. On the other hand, when it comes to a question of ascertaining the mind of the party, evidence such as that referred to by the Crown may be adduced. All the cases dealing with evidence in criminal matters shew that no extraneous evidence—no evidence such as is desired to be adduced here—is admissible to prove the commission of the act. When, indeed, it is a question of what is in the defendant's mind recourse may be had to extraneous evidence. In *Rex* v. *Bond* (4) Kennedy L.J. said: "It may be laid down as a general rule in criminal as in civil cases that the evidence must be confined to the point in issue . . . . and have no reference to any conduct of the prisoner unconnected with such charge; therefore it is not allowable to shew on the trial of an indictment that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted." The prosecution allege that the parties accused had and possibly now have a passion for each other; and that being under the influence of that passion and having gratified it two years ago, they are likely to gratify it now, and that the conclusion may be drawn that they have gratified it on the occasion charged. But the physical act and not the intent is in question, and the act must be established by evidence of

(1) (1854) 18 Jur. 882.
(2) 30 L. J. (P.) 23.
(3) [1900] P. 63.
(4) [1906] 2 K. B. 389, 397.

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what occurred at the time at which it was alleged to have occurred.

[LORD LOREBURN L.C. Your objection is to the evidence of an antecedent passion which may have passed away.]

The objection is to the introduction of acts or conduct on some previous occasion. It was introduced for the purpose of shewing that the accused had committed the offence on a previous occasion and therefore the Court must come to the conclusion that they had committed it again. This cannot be done.

Apart from the debateable case of *Makin* v. *Attorney-General for New South Wales* (1), there is no case in which evidence of this kind has been admitted except to prove what was in the mind of the party.

[LORD LOREBURN L.C. Kennedy L.J. in *Rex* v. *Bond* (2) said: "The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial."]

That is because, in murder, you have the act, and then the question of what was in the mind of the assailant.

[LORD ATKINSON. Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him. You can give in evidence the enmity of the accused towards the deceased to prove that the accused took the deceased's life. Evidence of motive necessarily goes to prove the fact of the homicide by the accused, as well as his "malice aforethought," inasmuch as it is more probable that men are killed by those who have some motive for killing them than by those who have not.]

Proof of malice and previous acts of attempt to murder is no evidence of the act of murder.

In Russell on Crimes, 6th ed., vol. 3, p. 403, it is laid down that "No evidence can be admitted which does not tend to prove or disprove the issue joined."

1) [1894] A. C. 57. (2) [1906] 2 K. B. 389, 401.

As to the argument with regard to the proof of adultery in the Divorce Court, the evidence in the Divorce Court is not exactly of the same nature as that in the Criminal Courts.

[EARL OF HALSBURY. I am not aware that there is a difference in the law of evidence in criminal and other cases.]

There may be no difference in theory, but there is in practice. In *Reg.* v. *Oddy* (1) evidence of the possession by the prisoner of property other than that charged in the indictment, stolen from other persons, was held not admissible. That has been modified by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19, but the principle of the decision is unaffected. To shew upon a charge of assault that there was enmity between two persons would not shew that on one particular day one struck the other.

[EARL OF HALSBURY. Would it not be evidence to shew on an indictment for murder that there was enmity?]

It might be admissible to shew malice. There the prosecution have to prove the murder, and here that the offence was committed.

Sir R. Isaacs, A.-G., in reply, was stopped as to any further argument on the admissibility of the evidence. With regard to the form of the proceedings on the present appeal, there are two views of the jurisdiction of the House. The first is, That the object of conferring this jurisdiction was only to enable the highest tribunal to give an opinion on the practice for guidance in future cases: which opinion may not affect the conviction or acquittal of the particular person charged. The second view is, That the House can do more than pronounce a decision on the law—that it can restore the conviction.

Sect. 1, sub-s. 6, of the Criminal Appeal Act, 1907, which enacts that, where the Director of Public Prosecutions or the prosecutor or defendant obtains the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involves a point of law of exceptional importance, and that it is desirable in the public interest that a further appeal should be brought, they may appeal from that decision to the House, assumes that in such a case the determination of the Court of Criminal Appeal is not "final." It is to be observed that

(1) (1851) 5 Cox, C. C. 210; 20 L. J. (M.C.) 198.

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it is not only the Director of Public Prosecutions, who can appeal, but also "the prosecutor, or defendant;" and if the judgment of the Court of Criminal Appeal should be reversed, it is submitted that the House will deal with the particular case before it. The House does not give a merely academical decision.

Where the Court of Criminal Appeal comes to the conclusion that a conviction is wrong it orders the record to be amended, but if this House comes to the conclusion that that record ought never to have been amended it may clearly direct the Court of Criminal Appeal to amend the record de novo.

[LORD LOREBURN L.C. You ask us to say that where the prosecutor under the fiat of the Attorney-General appeals, and we think that the quashing of the conviction was wrong, the original conviction must stand.]

It is submitted that where an appeal is successful it must be assumed that there is power to direct the Court of Criminal Appeal (1) to act upon the order of this House.

[LORD SHAW OF DUNFERMLINE. Would it be sufficient for your purpose that the judgment of the Court of Criminal Appeal should be reversed, and that the House should remit the case to the Court of Criminal Appeal to allow the remedy to be worked out?]

That would be sufficient. The Court of Criminal Appeal would then order that the verdict and judgment which they have quashed should be restored, and upon that the Court before which the defendants were tried would be ordered to restore the verdict and judgment. A certificate of conviction could then be obtained and a warrant issued for their arrest. An order of the House reversing the decision of the Court of Criminal Appeal will have the effect of restoring the conviction.

LORD LOREBURN L.C. My Lords, in this case two persons, a brother and sister, were indicted for incest in July, 1910, and

(1) Although writs of error are abolished, yet the ancient practice of the House remains, and in *Rose* v. *College of Physicians*, March 15, 1703, *Lords' Journals*, vol. 17, 482, the House reversed the judgment of the Queen's Bench fining Rose 5*l.*, and the House of Lords' judgment affixed to the record ordered the Court to reinstate Rose in all he had lost by the judgment reversed.

September, 1910. Certain evidence, which was obviously admissible, was given to establish that at all events there was ample opportunity for this offence, and that there were circumstances which, to say the least, were very suggestive of incest. Also these two persons lived together and occupied the same bedroom and the same bed. Further evidence was then tendered to shew that these persons had previously carnally known each other and had a child in 1908. The object was to establish that they had a guilty passion towards each other, and that therefore the proper inference from their occupying the same bedroom and the same bed was an inference of guilt, or—which is the same thing in another way—that the defence of innocent living together as brother and sister ought to fail.

My Lords, the law on this subject is stated in the judgment of Lord Chancellor Herschell in *Makin* v. *Attorney-General for New South Wales* (1); it is well known and I need not repeat it—the question is only of applying it. In accordance with the law laid down in that case, and which is daily applied in the Divorce Court, I consider that this evidence was clearly admissible on the issue that this crime was committed—not to prove the mens rea, as Darling J. considered, but to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or between the dates charged. Their passion for each other was as much evidence as was their presence together in bed of the fact that when there they had guilty relations with each other.

My Lords, I agree that Courts ought to be very careful to preserve the time-honoured law of England, that you cannot convict a man of one crime by proving that he had committed some other crime; that, and all other safeguards of our criminal law, will be jealously guarded; but here I think the evidence went directly to prove the actual crime for which these parties were indicted.

EARL OF HALSBURY. My Lords, I am entirely of the same opinion. I agree with the Lord Chancellor.

(1) [1894] A. C. 57, 64.

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LORDS ASHBOURNE, ALVERSTONE C.J., ATKINSON, GORELL, SHAW OF DUNFERMLINE, MERSEY, and ROBSON all concurred.

The following order was made in each appeal:—

Ordered and adjudged, in the name of the House of Lords, by the Lords of Appeal sitting in the House of Lords during the dissolution of Parliament, by virtue of a writing by His Majesty the King under his Sign Manual, dated the 28th day of November, 1910, *pursuant to the provisions of the Appellate Jurisdiction Act,* 1876, *that the said order of His Majesty's Court of Criminal Appeal of the 8th day of November,* 1910, *complained of in the said appeal, be, and the same is hereby, reversed. And it is further ordered that the cause be, and the same is hereby, remitted back to the Court of Criminal Appeal to do therein as shall be just and consistent with this judgment.* (1)

Lords' Journals, December 15, 1910.

COURT OF CRIMINAL APPEAL.

Dec. 19. *Graham-Campbell,* for the prosecution, moved for an order restoring the conviction and dismissing the original appeal against the conviction under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907. The Court of Criminal Appeal is a Court of record—s. 1, sub-s. 7—and under s. 9 may exercise any of the powers of the Court of Appeal in civil matters. Upon this Court making an order to that effect, the registrar will, under r. 35 of the Criminal Appeal Rules, 1908, notify the officer of the Court of trial that the conviction has been restored, and the record will be amended accordingly. The Court can also grant a warrant,

(1) The Order of the House as originally pronounced did not contain words remitting the case to the Court below; but the above is the completed Order, and the form that will be used in future cases where applicable.

under s. 9 of the Act, for the arrest of the female defendant, who has not surrendered. (1)

Forrest Fulton (*Eustace Fulton* with him), for the defendants. This Court, having, under s. 4, sub-s. 2, of the Criminal Appeal Act, 1907, allowed the appeal against the conviction and quashed the conviction and directed a judgment and verdict of acquittal to be entered, has no power under the Act to restore the conviction. The Court being the creature of the statute, its powers are limited accordingly. The making of an order quashing a conviction and directing a judgment and verdict of acquittal to be entered is different from merely allowing an appeal. The Court by making such an order has exercised the functions of the jury, and the position of the defendants is the same as if they had been acquitted at the trial. The Act distinguishes between the position of a defendant and the position of the Crown. It gives a person who has been convicted upon indictment a right of appeal by leave against his conviction, and upon that appeal the Court may allow further evidence to be called. There is no such right of appeal given to the Crown where the defendant has been acquitted, even though further evidence may be forthcoming. The acquittal at the trial is final, and so also is the order of this Court allowing an appeal against conviction and directing a judgment and verdict of acquittal to be entered. The intention of the Legislature in enacting s. 1, sub-s. 6, of the Act is that, while the decision of the Court of Criminal Appeal is to be final as regards the particular appellant, in a matter involving a point of law of exceptional public importance an appeal should be provided so as to have the decision of the highest tribunal for the guidance of judges in future cases. The "determination" of the point of law by the Court of Criminal Appeal is to be final subject to that determination being reversed by the House of Lords; but the order of the Court of Criminal Appeal under s. 4, sub-s. 2, consequent upon their determination of the point of law is as final as if there had been a verdict of acquittal at the trial. The words in s. 4, sub-s. 2, "subject to the special provisions of this Act," mean subject to the provisions of s. 5 as

(1) At the sitting of the Court the male defendant surrendered, but the female defendant was stated to be ill and unable to surrender.

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to the power of the Court in special cases where, instead of allowing the appeal, the Court may order the proper conviction or sentence to be entered. This Court has not the same powers as the Court of Appeal in civil matters, as it has no power to order a new trial. No doubt, if this Court had dismissed the defendants' appeal and the House of Lords had reversed that decision, this Court could make an order consequential thereon under s. 4, sub-s. 2, quashing the conviction and directing a judgment and verdict of acquittal to be entered, because it had not already exercised that statutory power. In the present case the Court has already exercised that statutory power, and its order is final.

The judgment of the COURT (Lord Alverstone C.J., Pickford and Avory JJ.) was delivered by

LORD ALVERSTONE C.J. We entertain no doubt as to the power and duty of this Court upon this application. Upon a former occasion we decided that, inasmuch as the conviction was quashed, this Court had no power to keep the appellants in custody or to hold them to bail pending an application to the Attorney-General for his certificate under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, and pending an appeal to the House of Lords if the certificate were granted. The appeal to the House of Lords has succeeded, and the order of this Court has been reversed with the natural consequence that the conviction ought to be restored. In those circumstances the proper procedure has been adopted, namely, of applying to this Court, which is a Court of record, to give effect to the order of the House of Lords by restoring the conviction and dismissing the original appeal, and to expunge from the record the order of this Court quashing the conviction and directing a judgment and verdict of acquittal to be entered.

It is said on behalf of the defendants that, inasmuch as this Court has allowed the appeal and quashed the conviction and directed a judgment and verdict of acquittal to be entered, we have no power to make a further order restoring the conviction consequential upon the decision of the House of Lords reversing the order of this Court. If that were correct, the result would be

serious, because the effect would be to allow a guilty person to go free. It would require very clear words to support such a contention. The language of s. 1, sub-s. 6, seems to us to negative it. The appeal to the House of Lords under that sub-section is not, as has been suggested, provided solely for the purpose of obtaining guidance in future cases. An appeal is allowed if the Attorney-General gives his certificate that the decision of this Court involves a point of law of exceptional public importance and that it is desirable that a further appeal should be brought. So far as some principle may be laid down by the House of Lords, no doubt the decision will be a guide in future cases, but it can only be a guide in cases where the circumstances are similar. The decision itself is a decision in the particular case. Sect. 1, sub-s. 6, gives a defendant as well as the Director of Public Prosecutions, or the prosecutor, a right to apply for the certificate of the Attorney-General with a view to an appeal to the House of Lords, and if upon his appeal the House of Lords reverses the order of the Court of Criminal Appeal dismissing his original appeal, it is obvious that he must be entitled to ask this Court to give effect to the order of the House of Lords by quashing the conviction and directing a judgment and verdict of acquittal to be entered, and thus to release him from custody. The same reasoning applies where the appeal is by the prosecutor or by the Director of Public Prosecutions. This point was discussed in the House of Lords, and it was thought right to adopt the form of order simply reversing the order of this Court, because it was considered that this Court has full power to give effect to the decision of the House of Lords. Sect. 1, sub-s. 6, makes the determination of an appeal by this Court final subject to an appeal to the House of Lords; and the power of this Court under s. 4, sub-s. 2, is "subject to the special provisions of this Act." Sect. 9 also provides that this Court may exercise "any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court." In these circumstances it seems to us that the conviction has been in effect restored by virtue of the decision of the

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House of Lords, and we have power to give effect to that decision by directing that the original appeal be dismissed, and the conviction be restored, and we make an order directing the record to be amended in accordance with the decision of the House of Lords. The defendant who has surrendered will remain in custody, and a warrant will be issued under s. 9 for the arrest of the female defendant.

Order accordingly.

Solicitor for prosecution: *Director of Public Prosecutions.*
Solicitor for defendants: *F. A. S. Stern.*

W. F. B.

NOTE.

In THE HOUSE OF LORDS.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL (ENGLAND).
TO THE RIGHT HONOURABLE THE HOUSE OF LORDS.

The Humble Petition and Appeal of the Director of Public Prosecutions (on behalf of His Majesty).

Whereas your Petitioner has, in pursuance of section 1, sub-section 6, of the Criminal Appeal Act, 1907, obtained the certificate set out in the Second Schedule hereto of His Majesty's Attorney-General, that the decision of the Court of Criminal Appeal hereinafter referred to involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought from the said Court of Criminal Appeal.

Your said Petitioner humbly prays that the matter of the Order set forth in the First Schedule hereto may be reviewed before His Majesty the King in his Court of Parliament, and that the said Order may be reversed, varied or altered, or that the Petitioner may have such other relief in the premises as to His Majesty the King in His Court of Parliament may seem meet, and, if it shall seem meet to His Majesty the King in his Court of Parliament so to order, that William Henry Ball mentioned in the First Schedule to the appeal may be ordered to lodge such Case as he may be advised, and the circumstances of the case may require, in answer to this appeal, and that service of such order on the solicitor for the defence of the said William Henry Ball in the said prosecution may be deemed to be good service, and that such other and further directions in the premises as may be necessary for the due determination of the said appeal may be given as to His Majesty the King in his said Court of Parliament may seem meet.

FIRST SCHEDULE.

In the Matter of a certain Criminal Proceeding wherein the Director of Public Prosecutions was the Prosecutor and William Henry Ball and Edith Lilian Ball the Defendants.

The Order of the Court of Criminal Appeal dated the 8th day of November, 1910, appealed from is in the words following, namely:—

In the Court of Criminal Appeal.

REX *v.* WILLIAM HENRY BALL AND EDITH LILIAN BALL, } Appellants.

The 8th day of November, 1910.

Upon reading the Notices of Appeal against conviction given by each of these Appellants and upon hearing Mr. Forrest Fulton, Counsel assigned to the Appellants, and Mr. Graham-Campbell, Counsel for the Director of Public Prosecutions, this Court doth allow the Appeal and doth quash the conviction and direct a judgment and verdict of acquittal to be entered in the case of each of the Appellants.

SECOND SCHEDULE.

In the Matter of WILLIAM HENRY BALL and EDITH LILIAN BALL, both of whom were convicted of offences against the Punishment of Incest Act, 1908, before the Honourable Mr. Justice Scrutton at the Central Criminal Court on the 14th October, 1910,

and

In the Matter of the CRIMINAL APPEAL ACT, 1907.

I hereby certify that the decision of the Court of Criminal Appeal of the 8th November, 1910, in the Appeals of the above-named William Henry Ball and Edith Lilian Ball against the aforesaid conviction involves a point of law of exceptional public importance and that in my opinion it is desirable in the public interest that a further appeal should be brought.

I therefore authorise the Director of Public Prosecutions to appeal to the House of Lords in accordance with the provisions of section 1 (sub-section 6) of the Criminal Appeal Act, 1907.

(Signed) RUFUS D. ISAACS,
Attorney-General.

Law Officers' Department,
16th November, 1910.

[PRIVY COUNCIL.]

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STANDARD IDEAL COMPANY . . . . . DEFENDANTS;

AND

July 12, 13 14; *Nov.* 1. STANDARD SANITARY MANUFACTURING COMPANY . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF KING'S BENCH (APPEAL SIDE) FOR THE PROVINCE OF QUEBEC.

Quebec Act 4 *Edw.* 7, *c.* 34—*Construction—Extra-provincial Corporation—Canadian Trade Mark and Design Act*, 1879—*Trade Mark—Descriptive Words—"Standard."*

An American company with its headquarters in Pittsburg, which sells its goods in Montreal and throughout the Province of Quebec through an agent acting as a traveller and taking orders, and consigns them direct to the customer, who pays direct to the company, does not thereby carry on business in Quebec within the meaning of Quebec Act 4 Edw. 7, c. 34.

In an action against the defendant company charging that it had infringed the plaintiffs' trade mark, consisting of the word "Standard," and was passing off its goods as and for those of the plaintiffs:—

Held, (1.) that the word "standard," being a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else, could not be an apt or appropriate instrument for distinguishing the goods of one trader from those of another, and was not a valid trade mark within the meaning of the Canadian Trade Mark and Design Act, 1879 (42 Vict. c. 22), under which the plaintiffs had registered it; (2.) that on the evidence the defendant company had not passed off the plaintiffs' goods as its own, and the word "standard" had not acquired a secondary signification so as to mean goods manufactured by the plaintiffs when applied to the articles of toilet use the subject of the action.

APPEAL from a judgment of the above Court (February 25, 1910) which unanimously affirmed a judgment of Archibald J., the trial judge (May 17, 1909).

The injunction granted by the trial judge under the circumstances stated in the judgment of their Lordships restrained the appellant company from using the word "standard" in connection with enamel bath tubs, washstands, lavatories, sinks, laundry

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

trays, and other articles of toilet use and their attachments, either by stamping upon the said goods or by circular or advertising or otherwise, and from representing to the public that goods, wares, and merchandise manufactured and sold by it are the goods, wares, and merchandise of the respondents.

The grounds of suit as stated in the declaration were the infringement of the respondents' registered trade mark, the use by the appellant company of the word "standard" in order to mislead the public, and the passing off by such means of its own goods as those of the respondents. The defence was that the respondents were not entitled to the exclusive use of the word "standard," which could not form the subject of a trade mark; and, if entitled, had lost the right by acquiescence in the appellants' user of the word since their incorporation. It further submitted that the respondents as a foreign company were prohibited from carrying on business without a licence under 4 Edw. 7, c. 34, s. 2 of which Act is as follows:—

"2. No extra-provincial corporation shall carry on business in the Province of Quebec, unless a licence under this Act has been granted to it and unless such licence is in force.

"No company, firm, broker, agent, or other person shall, as the representative or agent of, or acting in any capacity other than as traveller taking orders for any such extra-provincial corporation, carry on any of its business in the Province of Quebec, unless such corporation has received such licence and unless such licence is in force."

The trial judge decided that the word "standard" had acquired a secondary meaning and that the appellant company in adopting the word "standard" in its corporate name and by its catalogue and labels was carrying on business in such a manner as to mislead the public. With regard to 4 Edw. 7, c. 34, s. 2, he held that "whatever effect the absence of a licence under that statute might have upon plaintiffs' right to recover upon sales made in this Province without such licence, plaintiffs' civil rights are not taken away and plaintiffs can restrain the defendant company from violating such rights."

The Court of King's Bench held that the prohibition contained in the Act left the respondents free (1.) to sell their wares

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outside of the Province of Quebec to persons in the Province; (2.) to have commercial travellers to take orders even in Quebec for the sale and shipment of their wares from the United States into the Province of Quebec; and that for the protection of the respondents in carrying on their business in either of these ways they had the right to resort to the Courts of the Province to protect their trade mark. As to the word "standard," the Court held that it had acquired a secondary meaning and meant the goods of the respondents.

Shepley, K.C., *Lafleur, K.C.*, and *C. A. Pope*, for the appellants, contended that the respondents carried on their business in contravention of the laws of the Quebec Province and therefore were not entitled to invoke the protection of the Quebec Courts and law in so doing. They were an extra-provincial corporation within the meaning of Quebec Act 4 Edw. 7, c. 34, and had neglected to obtain a licence under that Act, and their business in consequence was carried on in disregard of the prohibition enacted by that Act. Reference was made to ss. 2 and 3 and to *Grainger & Son* v. *Gough*. (1)

Upon the merits they contended that the word "standard" could not be made the subject of a valid trade mark. Even if it could, the trade mark so established would not be infringed by the use of the word coupled with another word equally striking and more conspicuously displayed. The evidence and admissions by the respondents shewed that many competing companies used the word "standard" coupled with the names of the specialties in which they dealt, or of the operations which they conducted. The words "ideal" and "sanitary manufacturing" sufficiently differentiated the two companies in this case. There was no evidence that the appellants had ever used the word "standard" alone or that any confusion of names had resulted. It was contended that the word "standard" could not acquire a secondary meaning so that a trader could acquire a right to the exclusive use of that word. Still less could he acquire the right to prevent that word being used when coupled with another equally if not more distinctive. There was no

(1) [1896] A. C. 325.

evidence that the word had acquired such secondary meaning, if it were capable of acquisition, or that the appellants had passed or attempted to pass off their goods as the goods of the respondents. There was no proof that any person had been misled or induced to take the appellants' goods in substitution for those of the respondents. Reference was made to Cons. Stat. Canada, 1886, c. 63, ss. 8, 9, 11; *Cellular Clothing Co.* v. *Maxton & Murray* (1); *Partlo* v. *Todd* (2); *Computing Scale Co.* v. *Standard Computing Scale Co.* (3)

C. J. Doherty, K.C., and *H. J. Trihey*, for the respondents, contended that they did not carry on business in the Province of Quebec within the meaning of the Act 4 Edw. 7, c. 34, and were not affected by the prohibition contained therein. The absence of a licence under that Act would not in any event affect their right to protection of their trade mark and trade name in Quebec or deprive them of their rights as sought to be enforced in this action. They referred to *City of Halifax* v. *Maclaughlin Carriage Co.* (4)

The use of the word or name "standard" by the appellants in connection with goods of the kind manufactured and sold by the respondents is an infringement of the respondents' registered trade mark; and irrespective of the statute is also an infringement of the respondents' right to their trade name or common law trade mark. The evidence proved and the Courts below found that the word "standard" as applied to toilet articles had acquired a secondary meaning by long user by the respondents. It had come to be recognized as indicating the respondents' goods. The appellant company had fraudulently selected its corporate name in order to mislead the public and pass off its goods as those of the respondents. The public had thereby been deceived. The appellant company had no right to use its corporate name so as to violate the respondents' trade mark and pass off its goods as those of the respondents. Reference was made to *Smith* v. *Fair* (5); *Singer Manufacturing Co.* v. *Loog* (6);

(1) [1899] A. C. 326.
(2) (1888) 17 Can. S. C. R. 196.
(3) (1902) 118 Fed. Rep. 965.
(4) (1907) 39 Can. S. C. R. 174, 179, 186.
(5) (1887) 14 Ont. Rep. 729.
(6) (1882) 8 App. Cas. 15, 19.

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Crawford v. *Shuttock* (1); *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal* (2); *McAndrew* v. *Bassett* (3); *In re Powell's Trade Mark* (4); *Rodgers* v. *Nowill.* (5)

Counsel for the appellants were not heard in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a judgment of the Court of King's Bench (Appeal side) for the Province of Quebec confirming with a slight variation a judgment of the Superior Court of that Province. The judgment so varied restrains the Standard Ideal Company, the defendant in the action, "from using the word 'standard' in connection with enamelled bath tubs, washstands, lavatories, sinks, laundry trays, and other articles of toilet use, and their attachments, either by stamping upon said goods or by circulars, or advertising or otherwise in designating or describing the said particular kind of wares, and from representing to the public that goods, wares, or merchandise manufactured or sold by the said defendant are the goods, wares, or merchandise of the plaintiff."

The plaintiff is an American corporation. Its headquarters are in Pittsburg. The defendant is a Canadian company. Its works are situate at Port Hope, Ontario.

The declaration in the action alleged that the Standard Sanitary Manufacturing Company was incorporated under the laws of the State of New Jersey on October 26, 1899; that it acquired the goodwill, trade marks, and assets of a company incorporated under the laws of the State of Pennsylvania as the Standard Manufacturing Company; that the Standard Manufacturing Company carried on business throughout the Province of Quebec and elsewhere from and after the year 1890; that the goods of the Standard Manufacturing Company were known by that company's name and trade mark "Standard"; that the Standard Sanitary Manufacturing Company continued the sale of goods manufactured by the Standard Manufacturing Company throughout the Province of Quebec and elsewhere, and

(1) (1867) 13 Grant's Upper Can. Rep. Ch. 149.
(2) (1902) 32 Can. S. C. R. 315.
(3) (1864) 33 L. J. (Ch.) 561.
(4) [1893] 2 Ch. 388.
(5) (1847) 5 C. B. 109.

used in connection with the said goods the said name and trade mark. The declaration further alleged that on July 21, 1906, the Standard Sanitary Manufacturing Company registered in Canada as a specific trade mark the said trade mark, consisting of the word "standard." The declaration then charged that the defendant, the Standard Ideal Company, had infringed the plaintiff's trade mark, and was passing off its goods as and for the goods of the plaintiff company. The claim was for an injunction and damages.

The defendant denied the charge of infringement and the charge of passing off, and further alleged that the word "standard" was in common use by manufacturers and dealers in various classes of merchandise, and that the said name could could not in law form the subject of a valid or exclusive trade mark. The defendant also alleged that the plaintiff company was carrying on business in Quebec in contravention of an Act of the Quebec Legislature and was therefore not entitled to protection from the Courts of that Province.

The Quebec Act on which the defendant relied is the Act 4 Edw. 7, c. 34. It enacts that no extra-provincial corporation shall carry on business in the Province of Quebec unless a licence under the Act has been granted to it, and unless such licence is in force, and that no company, firm, broker, agent, or other person shall, as the representative or agent of, or acting in any capacity other than as traveller taking orders for, any such extra-provincial corporation, carry on any of its business in the Province of Quebec unless such corporation has received such licence, and unless such licence is in force. The licence is granted upon certain conditions, one of which is that the applicant for a licence must deposit in the office of the Provincial Secretary a power of attorney constituting a chief agent in the Province for the purpose of receiving service in any suit or proceeding.

The plaintiff company then amended its declaration by alleging that its sales in Montreal and throughout the Province of Quebec were made through an agent acting as a traveller taking orders.

At the trial Mr. John M. Collins deposed that he represented the plaintiff company as sales agent for Canada, travelling and calling on wholesale houses taking orders and sending them to

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Pittsburg. "The goods," he said, "are shipped direct to the customer, and the customer pays direct to the company for the goods, and we are simply the sales agents selling the goods as travellers for the company." He added in cross-examination that it was unnecessary to have a show-room in Montreal, and that they did not now carry a stock there for the Standard Sanitary Manufacturing Company. This evidence was not contradicted. Their Lordships therefore think that it must be taken to be established that the plaintiff company is not acting in contravention of the statute, and is not in fact now carrying on business in Quebec, though it employs a traveller to solicit orders in that Province.

On the question as to the validity of the alleged trade mark their Lordships are compelled to differ from the Court of King's Bench. The Canadian Trade Mark and Design Act, 1879 (42 Vict. c. 22), requires trade marks to be registered. It does not, however, contain a definition of trade marks capable of registration. It provides that "All marks, names, labels, brands, packages, or other business devices, which are adopted for use by any person in his trade, business, occupation, or calling for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed, or offered for sale by him applied in any manner whatever, either to such manufacture, product, or article, or to any package, parcel, case, box or other vessel, or receptacle of any description whatsoever containing the same, shall for the purposes of this Act be considered and known as trade marks."

The Act, however, declares that the Minister may refuse to register any trade mark "if the so-called trade mark does not contain the essentials necessary to constitute a trade mark properly speaking."

The Act does not define or explain the essentials of a trade mark, nor does it provide for taking off the register an alleged trade mark which does not contain the requisite essentials. In applying the Act the Courts in Canada appear to consider themselves bound or guided mainly by the English law of trade marks and the decisions of the Courts of the United Kingdom.

Now the word "standard" is a common English word. It seems

to be used not unfrequently by manufacturers and merchants in connection with the goods they put upon the market. So used it has no very precise or definite meaning. But obviously it is intended to convey the notion that the goods in connection with which it is used are of high class or superior quality or acknowledged merit. Without attempting to define "the essentials necessary to constitute a trade mark properly speaking" it seems to their Lordships perfectly clear that a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else cannot be an apt or appropriate instrument for distinguishing the goods of one trader from those of another. Distinctiveness is the very essence of a trade mark. The plaintiff company was therefore not entitled to register the word "standard" as a trade mark. The result is, in accordance with the decision of the Supreme Court in *Partlo* v. *Todd* (1), that the word though registered is not a valid trade mark. The action so far as it is based on alleged infringement of trade mark must fail.

There remains the charge of passing off. On that question also their Lordships are compelled to differ from the Court of King's Bench.

The evidence falls far short of establishing the proposition that the word "standard" has acquired a secondary signification and so means, as applied to articles of toilet use, goods manufactured by the plaintiff company. Moreover, there is no proof that any person has ever been deceived by the alleged similarity between the trade designation used by the defendant and that used by the plaintiff, nor is there any probability of deception. The plaintiff is an American company, not carrying on business in the ordinary sense of the term, in the Province of Quebec; the defendant is a Canadian company trading there. Each proclaims in its labels and advertisements its headquarters or place of manufacture. The defendant company makes the same class of goods as the plaintiff company. It has apparently imitated or copied some of the plaintiff's designs and patterns. It has undoubtedly copied many of the plaintiff's

(1) 17 Can. S. C. R. 196.

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advertisements and photographs, as well as the combination of colours adopted by the plaintiff company in its green and gold labels. But this is not an action for infringement of copyright in designs or letterpress. It is an action for infringement of trade mark and for passing off. The question of trade mark has been disposed of. As for the charge of passing off, although the defendant company has availed itself unscrupulously, if not unfairly, of the labour, ingenuity, and expenditure of the plaintiff company in preparing the ground and educating the public on sanitary questions and bringing into notice the most fashionable and up-to-date articles of toilet use, it is impossible to come to the conclusion that the trade designation adopted by the defendant company is calculated to deceive or to lead customers to believe that in buying its goods they are buying the goods of the plaintiff company. The defendant company is protected by a high tariff and can afford to undersell the plaintiff company. There seems to be no reason why it should seek to pass off its goods as the goods of the plaintiff company. Nor is there really any evidence tending to prove that it has ever done so.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the action dismissed with costs here and below.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitor for respondents: *Charles Russell.*

[PRIVY COUNCIL.]

BURRARD POWER COMPANY, LIMITED AND ANOTHER . . . . . } DEFENDANTS;

AND

THE KING . . . . . PLAINTIFF.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

British Columbian Water Clauses Consolidation Act (61 *Vict. c.* 190), *s.* 4—*Grant of Water Rights in Public Lands conveyed to the Dominion—Provincial Legislation relating thereto ultra vires.*

Certain water rights in lands known as the Railway Belt for British Columbia were granted to the appellants by Water Commissioners who purported to act under the British Columbian Water Clauses Consolidation Act, 1897 (61 Vict. c. 190), s. 4.

On an information filed by the Dominion claiming that the grant was invalid and conveyed no interest to the appellants:—

Held, that (1.) the Railway Belt having been conveyed by the Province to the Dominion by provincial statutes for railway purposes as contemplated by the 11th article of the Terms of Union, it resulted that the proprietary rights therein, which before the transfer belonged to the Crown in right of the Province, after the transfer belonged to the Crown in right of the Dominion for a public purpose; (2.) being public lands both before and after the transfer, they were public property within the meaning of s. 91 of the British North America Act, 1867, and as such were under the exclusive legislative authority of the Dominion Parliament; (3.) the above Water Clauses Consolidation Act could not affect the waters upon those lands and on its true construction (see s. 2) did not purport to do so.

APPEAL by special leave from a judgment of the Supreme Court of Canada (February 15, 1910) affirming a judgment of the Exchequer Court of Canada (May 10, 1909) which declared that a grant dated April 7, 1906, by the Water Commissioners for the district of New Westminster, British Columbia, to the appellants of a record of 25,000 inches of water out of the Lillooet Lakes and River and their tributaries was invalid and conveyed no interest to them.

The judgment also declared that the grant be cancelled

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

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(1.) as being an interference with property subject to the exclusive authority of the Dominion of Canada; (2.) because the outflow of water intended to be authorized thereunder would be a very serious interference with the navigability of the river; and (3.) because the said record was not authorized by or under the provisions of the statute of British Columbia Water Clauses Consolidation Act, 1897; and ordered accordingly.

The question decided was as to the rights of the Dominion in lands known as the Railway Belt of British Columbia, and specifically whether the water rights therein were vested in the Dominion by force of a grant from the Government of British Columbia.

By Order in Council (May 16, 1871) British Columbia was admitted into the Dominion of Canada subject to the provisions of British North America Act, 1867, and to the Terms of Union between the Dominion and the Province which became effective under s. 146 of that Act, the 11th article of which Terms of Union is as follows:—

"The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the union.

"And the Government of British Columbia agree to convey to the Dominion Government, in trust to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the said railway, a similar extent of public lands along the line of railway, throughout its entire length in British Columbia, not to exceed however twenty (20) miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands in the North-West Territories and the Province of Manitoba. Provided that the quantity of land which may be held under pre-emption right or by Crown grant within the limits of the tract of land in British Columbia to be so conveyed

to the Dominion Government shall be made good to the Dominion from contiguous public lands, and provided further that until the commencement within two years, as aforesaid, from the date of the union, of the construction of the said railway, the Government of British Columbia shall not sell or alienate any further portions of the public lands of British Columbia in any other way than under right of pre-emption, requiring actual residence of the pre-emptor on the land claimed by him. In consideration of the land to be so conveyed in aid of the construction of the said railway, the Dominion Government agree to pay to British Columbia, from the date of the union, the sum of 100,000 dollars per annum in half-yearly payments in advance."

The grant of the said lands known as the Railway Belt was effected by British Columbia Act 43 Vict. c. 11, amended by 46 Vict. c. 14, s. 2, and 47 Vict. c. 14, s. 2. Thereafter the provincial Chief Commissioner of Land and Works, purporting to act under s. 136 of the provincial Water Clauses Consolidation Act, 1897 (R. S. 1897, c. 190), issued a notice reserving for industrial powers all unrecorded waters in a described area, which included the Lillooet Lake and River ; and the appellants obtained under the same Act the grant of water rights on which they relied. Upon an information by the Attorney-General of Canada the Supreme Court held that while the Railway Belt was vested by the said grant in the Dominion the Water Commissioners of the Province were incompetent to make grants of water records under the said provincial Act of 1897, which would in the operation of the powers thereby conferred interfere with the proprietary rights of the Dominion therein.

Idington J. rested his opinion " on the broad right of the Dominion to the use of the water, and issue raised in regard to it, which is no doubt what the parties desire to have determined, rather than upon the narrow one of the possible interference with navigation, which must depend upon facts. These once ascertained as shewing interference with navigation, the Dominion's right is undoubted."

Duff J., with whom Fitzpatrick C.J. and Davies J. concurred, considered that "the true view of the 11th article (referring

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to the Terms of Union) is that the power to deal with and manage the tract of land to be transferred by the Dominion thereunder is vested in the Dominion, and that as a consequence the Province could neither assume any part of the land so vested in the Dominion for itself, nor dismember the Dominion's proprietary rights in it by conferring any such rights upon others."

Anglin J. held it to be manifest that the diversion of the water proposed by the appellant would seriously interfere with, if not destroy, the navigation of the Lillooet River ; that " by s. 91 (10.) of the British North America Act, 1867, legislative jurisdiction over navigation is vested exclusively in the Dominion Parliament, and it has prohibited the erection of any dam which shall interfere with navigation (R. S. C. 1906, c. 116, s. 4). Because the carrying out of the scheme of the appellants will involve the construction of a dam which will interfere with navigation, I am of opinion that the judgment in appeal should be sustained." He also held that the provincial grant was an unauthorized interference with the property and incidental rights of the Dominion.

Girouard J. considered that the Court was bound by its previous decision in *Queen* v. *Farwell* (1) and that the appeal should be dismissed on that ground.

Lafleur, K.C., and *Hamar Greenwood*, for the appellants, contended that the grant of the Railway Belt effected by the provincial Act of 1880 and its amendments did not pass the water rights to the Dominion Government and did not vest the lands in them as public property within the meaning of s. 91, sub-s. 1, of the British North America Act, 1867. In *Attorney-General of British Columbia* v. *Attorney-General of Canada* (2), a case which related to precious metals, it was held that the said Acts merely transferred to the Dominion the provincial right to administer and dispose of the lands and appropriate their revenues. The Railway Belt was conveyed to the Dominion subject to the provincial law affecting the Crown lands of the Province, and the provincial Legislature retained the right to

(1) (1887) 14 Can. S. C. R. 392. (2) (1889) 14 App. Cas. 295.

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legislate in regard to it, and especially in regard to the water rights therein. As regards the water rights the grant effected by the Acts should be construed not merely in reference to the then existing law, but as subject to future provincial legislation. Accordingly the Water Privileges Act, 1892, and the Water Clauses Consolidation Act, 1897, which confirmed Crown rights in British Columbia as to water, operated on the lands the subject of the grant. Further it was contended that the lands in the Railway Belt did not constitute "property" within the meaning of s. 91 before cited. Reference was made to *Macgregor* v. *Esquimalt and Nanaimo Ry. Co.* (1) and *Esquimalt Water Works Co.* v. *City of Victoria Corporation* (2); to the British Columbia Ordinance of 1865, s. 44; its Land Ordinance of 1870 (33 Vict., No. 134), s. 30, and its Land Act, 1875 (38 Vict., No. 5), ss. 48 and 54, which limited the common law rights of riparian proprietors in British Columbia; to the Water Privileges Act (55 Vict. c. 47), s. 2, and the Consolidation Act of 1897 (61 Vict. c. 190, R. S. B. C.), ss. 4 and 5, and s. 2 (interpretation).

Newcombe, K.C., and *A. D. Bateson*, for the respondent, were not heard.

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The judgment of their Lordships was delivered by

LORD MERSEY. This is an appeal, by special leave, from the judgment of the Supreme Court of Canada, affirming a judgment of the Exchequer Court of Canada rendered on May 10, 1909.

The only question raised upon the appeal is whether certain water rights in the Railway Belt of British Columbia are vested in the Dominion Government so as to preclude the provincial Legislature from dealing with them. The circumstances in which the dispute has arisen are shortly as follows. The Province of British Columbia was admitted into the Dominion of Canada in the year 1871 under the provisions of the British North America Act, 1867. The admission was subject to the provisions of that Act and also to certain Articles of Union duly sanctioned by the Parliament of Canada and by the Legislature of British Columbia. The 11th of these articles stipulated that

(1) [1907] A. C. 462, 468. (2) [1907] A. C. 499, 509.

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the Dominion Government should secure the construction of railway communication between the railway system of Canada and the seaboard of British Columbia, and that the Government of British Columbia should convey to the Dominion Government, "in trust to be appropriated in such manner as the Dominion Government may deem advisable in the furtherance of the construction of the said railway," certain public lands along the line of railway throughout its entire length in British Columbia. In consideration of the land to be so conveyed in aid of the construction of the said railway the Dominion Government agreed to pay to British Columbia from the date of the union the sum of $100,000 per annum. The conveyance contemplated by this part of the 11th article was effected by subsequent statutes of the Legislature of the Province, and the land so conveyed is known as the "Railway Belt." The railway has now been built.

By the Water Clauses Consolidation Act, 1897 (61 Vict. c. 190, Revised Statutes of British Columbia), s. 4, the right to the use of the unrecorded water in any river, lake, or stream was declared to be vested in the Crown in the right of the Province, and it was enacted that save in the exercise of any legal right existing at the time of such diversions or appropriation no person should divert or appropriate any water from any river, watercourse, lake, or stream, excepting under the provisions of the Act. By s. 5 it was provided that no right to the exclusive use of such water should be acquired by any person by length of use or otherwise than as might be acquired or conferred under the provisions of the Act or of some existing or future Act. By s. 2 "water" was declared to mean all rivers and water power not being waters under the exclusive jurisdiction of the Parliament of Canada, and "unrecorded water" was declared to mean all water not held under a record under the Act or under certain repealed Acts or under special grant by public or private Act and should include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose.

On April 7, 1906, the Water Commissioners for the district of New Westminster, British Columbia, purporting to act under the provisions of this Act, granted to the appellants, the Burrard

Power Company, Limited, at an annual rental of $566, a water record for 25,000 inches of waters out of the Lillooet Lakes and the Lillooet River to be used for generating electricity. These waters are within the Railway Belt.

On December 26, 1906, the Attorney-General for the Dominion of Canada filed an information in the Exchequer Court of Canada against the Power Company, claiming a declaration that the record was invalid and conveyed no interest to the defendant company, and asking that the same should be cancelled. The information alleged that the works of the Power Company if carried out would have the effect of diverting the water of the river, thereby interfering with its navigation, and would otherwise materially diminish the value of the lands of the Dominion Government in the Railway Belt. In support of the claim reliance was placed on the agreement contained in the Terms of Union, and on the provisions of the Acts of the provincial Legislature passed for the purpose of giving effect to that agreement. Reliance was also placed on the provisions of s. 91 of the British North America Act, 1867, which declares that the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within certain classes of subjects, including the public debt and property and navigation. It was further submitted that, having regard to sub-s. 2 of s. 131 of the Water Clauses Consolidation Act, 1897, the grant of the record by the Commissioners was not authorized by the Water Clauses Act.

After the filing of the information the Attorney-General of British Columbia was added as a party to represent the interests of the Province.

On December 23, 1907, the determination of the issue of fact was referred for inquiry and report to Archer Martin J., who found the facts to be in accordance with the allegations of the Dominion Government, and reported accordingly. Thereupon the Attorney-General of Canada prayed judgment as asked by the information. On April 13, 1909, the case came on for argument before Cassels J., and on May 10, 1909, that learned judge declared that the grant of the record of water in question was invalid and conveyed no interest to the defendant

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company. The judgment proceeded on three grounds: first, that the grant was an interference with property subject to the exclusive authority of the Dominion of Canada; secondly, that the diversion of water intended to be authorized thereunder would be a very serious interference with the navigability of the river; and thirdly, that the record was not authorized by the provisions of the Water Clauses Act under which it had been granted. From this judgment an appeal was brought to the Supreme Court of Canada. The appeal was dismissed on February 15, 1910.

Their Lordships are of opinion that the judgments of the Courts below are right. The grant by the Province of British Columbia of "public lands" to the Dominion Government undoubtedly passed the water rights incidental to those lands. In the argument addressed to their Lordships this was not really questioned. But it was said that though the proprietary rights of the Province in the land and in the waters belonging thereto were transferred to the Dominion Government, the legislative powers of the Province over the same neither were nor could be parted with, and that therefore it was competent for the provincial Legislature to enact the Water Clauses Act of 1897 under which the record was granted. In support of this contention a passage was cited from the judgment of Lord Watson in *Attorney-General of British Columbia* v. *Attorney-General of Canada*. (1) Their Lordships are of opinion that the contention is wrong, and that the passage in Lord Watson's judgment affords no kind of support for it. The object of article 11 of the Terms of Union was on the one hand to secure the construction of the railway for the benefit of the Province and on the other hand to afford the Dominion a means of recouping itself in respect of the liabilities which it might incur in connection with the construction by sales to settlers of the land transferred. To hold that the Province after the making of such an agreement remained at liberty to legislate in the sense contended for would be to defeat the whole object of the agreement, for if the Province could by legislation take away the water from the land it could also by legislation resume possession of the land itself, and thereby so derogate from its own grant as to utterly destroy it.

(1) 14 App. Cas. at p. 301.

Lord Watson's reference in the *Precious Metals Case* (1) to the 11th article, so far from supporting the appellants' contention, is against it. He says "the conveyance contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands and to appropriate their revenues." The grant of the water record in the case now under consideration is an attempt on the part of the Province to appropriate the revenues to itself, and would if carried into effect violate the terms of the contract as interpreted by Lord Watson. It is true that Lord Watson adds that the land is not by the transfer taken out of the Province, and that once it is "settled" by the Dominion it ceases to be public land, and "reverts to the same position as if it had been settled by the provincial Government in the ordinary course of its administration." But this also is against the appellants' contention, for it implies that until settled by the Dominion it remains public land under the Dominion's control.

Their Lordships are of opinion that the lands in question so long as they remain unsettled are "public property" within the meaning of s. 91 of the British North America Act, 1867, and as such are under the exclusive legislative authority of the Parliament of Canada by virtue of the Act of Parliament. Before the transfer they were public lands, the proprietary rights in which were held by the Crown in right of the Province. After the transfer they were still public lands, but the proprietary rights were held by the Crown in right of the Dominion, and for a public purpose, namely, the construction of the railway. This being so, no Act of the provincial Legislature could affect the waters upon the lands. Nor, in their Lordships' opinion, does the Water Clauses Act of 1897 purport or intend to affect them; for, by clause 2, the Act expressly excludes from its operation waters under the exclusive jurisdiction of the Dominion Parliament.

The Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Gard, Rook & Co.*
Solicitors for respondent: *Charles Russell & Co.*

(1) 14 App. Cas. 295.

[PRIVY COUNCIL.]

J. C.* 1910 *July* 27, 28; *Nov.* 1.

W. J. McFARLAND . . . . . APPELLANT;

AND

BANK OF MONTREAL AND ROYAL TRUST COMPANY . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Bank Act, R. S. C., 1906, *c.* 29, *ss.* 99-111—*Deed of Agreement between Two Banks—Construction—Assignment in Trust.*

By deed dated October 13, 1906, an insolvent bank, in conformity with a resolution of its directors of even date, in effect assigned to the respondent bank unconditionally its call and current loans and securities and its interest in all debts and choses in action which it might possess or be entitled to, and authorized the respondent bank to act for and represent it and to receive and grant acquittances for all moneys payable in respect thereof, and agreed to discontinue its business and authorized the respondent bank to enter its premises and offices and use the same, together with its books and other appliances, for the conducting of banking business. The deed further defined the remuneration which the respondent bank should receive, and provided for its payment on its fulfilment of the terms and conditions of the deed of a sum of money in consideration of "the indirect benefit thereby accruing" to it.

On an application by the appellant, who had been placed on the list of contributory shareholders in the insolvent bank, for a direction to the liquidator to contest the claim of the respondent bank under the deed, it was contended that the deed was in effect a sale of the whole or part of the assets of the insolvent bank, and as such ultra vires and void under the Bank Act, R. S. C., 1906, c. 29, the conditions under which the Act authorized a sale by one bank to another not having been complied with:—

Held, that on the true construction of the deed, having regard to the resolution of the directors and the surrounding circumstances, there was nothing from which it could be inferred that a sale or purchase was within the contemplation of either party. The assets of the insolvent bank were assigned to the creditor bank, not for its own profit, but for the purpose of discharging the assignor's obligations. The clause which provided for payment for an indirect benefit did not amount to a sale and purchase of goodwill.

APPEAL from a judgment of the Court of Appeal (April 18, 1910) affirming an order of Britton J. (October 27, 1909) which dismissed an appeal of the Royal Trust Company, liquidator

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

of the Ontario Bank, and the appellant McFarland, a shareholder and contributory thereof, from the certificate of the official referee, which declared valid a deed dated October 13, 1906, made between the Ontario Bank and the respondent Bank of Montreal.

The question decided was as to the meaning and effect of a deed of agreement between the Ontario Bank and the Bank of Montreal dated October 13, 1906. The appellant contended that it constituted a sale of the assets of the former to the latter, and that as such it was inoperative and of no effect without the assent of the shareholders of the Ontario Bank and the subsequent approval thereof by the Governor in Council under the provisions of ss. 99 to 111 of the Bank Act (R. S. C., 1906, c. 29). The respondent contended that it was not a sale and purchase of assets within the meaning of those sections. There was a transfer of assets for purposes of realization, but the ultimate proceeds thereof were not for the benefit of the Montreal Bank but of the Ontario Bank, whose liabilities were to be paid thereout, the Ontario Bank remaining liable for excess payments, and entitled to excess proceeds. There was no out and out sale of goodwill or of any part of the assets. The provisions in the deed related to the winding up of the business of the Ontario Bank. The second and sixteenth clauses on which the appellant mainly based his construction thereof are set out in their Lordships' judgment.

On September 29, 1908, Latchford J. ordered the Ontario Bank to be wound up, the official referee to take the necessary proceedings, the respondent the Royal Trust Company being subsequently appointed liquidator. In those proceedings the Bank of Montreal claimed on an account made up on the basis of the said deed of agreement. The appellant applied for a direction that the liquidator should contest that claim. The referee dismissed that application, holding that the agreement provided for a loan and not a purchase and was a valid basis for taking the account. Britton J., and afterwards the Court of Appeal, affirmed that order.

Hellmuth, K.C., and *Glyn Osler*, for the appellant, contended that the transaction provided for by the agreement was a sale

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and not a loan. The description of it in clause 2 as a purchase, the repeated references in the agreement to purchase-money, together with the agreement to pay for the indirect benefit or goodwill, point to the intention having been one of sale and purchase. The referee and the Courts below laid stress upon irrelevant considerations of expediency and convenience, and on the critical condition of the Ontario Bank's affairs. It was submitted that the intention of the parties as expressed in the deed was that the respondent bank should acquire by purchase the assets and goodwill of the Ontario Bank, not subject to redemption but out and out, but subject to the condition that if the transaction could not be carried out the payment for indirect benefit or goodwill should not be due. It was an agreement for sale rendered invalid by the provision of the Bank Act (R. S. C., 1906, c. 29), ss. 99 to 111.

Nesbitt, K.C., and *Newcombe, K.C.*, for the Bank of Montreal, contended that the circumstances under which the agreement was entered into all contravened any intention to purchase. No price was mentioned, no other bank would lend the necessary money, and the provisions of the deed were directed to supply the sums necessary to stop an impending panic and the limitation of the power of the Ontario Bank to incur fresh liabilities during the pendency of the agreement. No payment for goodwill was suggested or provided for; the payment contemplated by clause 16 was in ease of the loan conditionally granted. Purchase by way of discount and rediscount in clause 2 means that the assets passed to the respondent bank with the liability of the Ontario Bank to make good any deficiency thence arising. The evidence shews that the transaction was so treated by all parties. The transaction so understood and acted upon was within the powers of the bank and its directors and did not contravene the sections of the Bank Act relied upon by the appellant.

Bicknell, K.C., for the Royal Trust Company.

Hellmuth, K.C., replied.

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Nov. 1.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In this case the appellant, who was a shareholder in the Ontario Bank (now in liquidation), having

been placed on the list of contributories, calls upon the liquidator to dispute the accounts of the Bank of Montreal, claiming to be a creditor, and in fact the only creditor, of the Ontario Bank.

The claim of the Bank of Montreal amounts to a very large sum. It covers the whole of the liabilities of the Ontario Bank at the time of its suspension. The claim is made up and brought in on the basis of an arrangement between the Ontario Bank and the Bank of Montreal, which is embodied in a deed under seal executed on the 15th, but bearing date October 13, 1906.

No objection is taken to the form of the application, or to the competence of the appellant in his individual capacity to impeach a deed made between the Bank of Montreal and the corporation of which he was a member. The argument at the Bar was confined to the consideration of the meaning and effect of the instrument itself. Was it or was it not a sale by the Ontario Bank of the whole or part of its assets? If it was a sale, then the transaction, as the appellant contends, was ultra vires and void. The Bank Act, R. S. C., 1906, c. 29, authorizes the sale by one bank to another of the whole or part of its assets, but it prescribes certain conditions, which in this case admittedly have not been complied with, and declares that until those conditions are fulfilled the agreement of sale is "of no force or effect."

The Ontario Bank had been incorporated in 1857 by a special Act of the Legislature of the late province of Canada. According to the annual report of 1906 it had a capital of $1,500,000, with a rest of $700,000. Its head office was in Toronto. It had thirty-one branches in Canada, and it was in good credit with its customers and the public up to October 13, 1906.

In the early part of September, 1906, Mr. Pope, the acting chief accountant of the Ontario Bank, reported to the directors serious defalcations on the part of one Charles McGill, the general manager. The position of the bank was found to be critical. Thereupon the directors reopened negotiations with the directors of the Royal Bank, who had at one time proposed an amalgamation with the Ontario Bank. The directors of the Royal Bank investigated the affairs of the Ontario Bank and declined to proceed further. Then the directors of the Ontario Bank took

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counsel with Mr. Clouston, the president of the Canadian Bankers' Association, and the managers of the principal chartered banks in Toronto. On the evening of Friday, October 12, 1906, there was a meeting at the private residence of Mr. Coulson, the general manager of the Bank of Toronto. The president of the Bankers' Association and the managers of the principal banks, with the exception of the Bank of Montreal, were present. A statement of the assets and liabilities of the Ontario Bank as on September 29 was produced. The meeting lasted from 8 P.M. to 2 A.M. on the following morning. All that night the various branches of the Ontario Bank were ringing up Mr. Pope over the telephone "asking for funds, asking for instructions, and asking what they were to do." It was plain that without immediate assistance the Ontario Bank would be unable to open its doors on Saturday morning. No result was arrived at at that meeting. No substantial offer of assistance was made. All present were convinced that their only hope was the Bank of Montreal. No other bank would or could come to the rescue. The manager of the Bank of Commerce intimated that he was authorized to say that assistance might be expected from the Bank of Montreal. So a committee was appointed to meet the representatives of the Bank of Montreal, who were to arrive at Toronto very early in the morning. The meeting took place at the King Edward Hotel. Mr. Braithwaite, the manager of the Bank of Montreal at Toronto, confirmed what had been said at the previous meeting by the manager of the Bank of Commerce. "That is no use, Mr. Braithwaite," said Mr. Pope, who appears to have taken the leading part on behalf of the Ontario Bank. "Can I put 'Bank of Montreal' on the windows and doors of the Ontario Bank?" Mr. Braithwaite said "Yes, you may." The question was asked twice, and twice the assurance was given. So the name of the Bank of Montreal was put up in all the branches of the Ontario Bank, before the bank opened on Saturday, October 13. The result was that in a large number of the branches the depositors were satisfied at once. In some of the city branches, where the daily papers had circulated all kinds of rumours, there was a run, but the run was met by the Bank of Montreal, which on that day afforded

assistance to the amount of about a million dollars. And thus by the courage and promptitude of the managers of the Bank of Montreal, and in consequence of the unlimited confidence which the public had in its position, the imminent danger of a commercial panic was averted, and an immense service was rendered to the community as well as to the Ontario Bank. Such is the account of the transaction given in the oral evidence. So far there seems to be no suggestion or hint of a sale or purchase. Of course the Bank of Montreal took up the matter as a business transaction expecting a fair remuneration for their services. But the transaction as described in the oral evidence is simply a financial operation, unusual and extraordinary no doubt, but not beyond the scope of legitimate banking.

In the minutes of the meeting of the directors of the Ontario Bank held at 9 A.M. on October 13, 1906, the transaction is recorded in the following terms:—

"It was unanimously resolved to ask the Bank of Montreal to re-discount the loans of this bank and to undertake to meet the demands of the depositors, and in consideration of its doing so this bank absolutely and unconditionally transfers said loans and all documents representing or relating to same, including all securities held as collateral, and sells, assigns, and transfers and sets over absolutely all its right, title, and interest in all debts and choses in action which it may possess or be entitled to, and agrees to hold same to the Bank of Montreal and authorizes the Bank of Montreal to act for and represent the Ontario Bank in reference to same and to receive and grant acquittances for all moneys payable in respect thereof, and the Ontario Bank agrees to guarantee and indemnify the Bank of Montreal in the premises, that is to say, guarantees payment of the debts and obligations so discounted and to indemnify against loss in any way in consequence of having entered into the transaction. It is also resolved and agreed that this bank discontinue the business of banking and permits and authorizes the Bank of Montreal to enter its premises and offices wherever situated and use the same together with its books and other appliances for the conducting of banking business. Also that the members of the staff of the bank may be dismissed and engaged by the Bank of

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Montreal at any time when the representative of the Bank of Montreal considers it necessary.

"It was further unanimously resolved that the president be authorized to execute under the corporation seal of the bank a form of agreement with the Bank of Montreal which was submitted, read, and approved to carry out the purpose of the above resolution on the details and figures being filled in the blanks thereof."

It will be observed that there is nothing in this resolution pointing to a sale. There is nothing from which it can be inferred that a sale or a purchase was within the contemplation of either party.

A second meeting of the board of directors of the Ontario Bank was held on the same day at 4 o'clock P.M., at which the minutes of the previous meeting were read and confirmed and Mr. Braithwaite was appointed general manager in the place of McGill, who was dismissed.

At a meeting of the directors held on October 15, 1906, the form of agreement referred to in the resolution of October 13 as completed was approved and duly executed under the seal of the Bank of Ontario. As already stated, it bears date October 13.

At a second meeting on the same day it was resolved that the Ontario Bank do suspend payment of its liabilities and that notice of its suspension be given to the president of the Canadian Bankers' Association, who was requested to appoint a curator pursuant to the Bank Act Amendment Act, 1900, and the by-laws of the Canadian Bankers' Association.

A curator and an advisory board were accordingly appointed, and at a special general meeting of the shareholders of the Ontario Bank held on December 11, 1906, the old directors retired and a new board composed of gentlemen connected with the Bank of Montreal was duly elected.

The realization of the assets was carried on by the board of the Ontario Bank in due course, and meetings of the shareholders of the Ontario Bank were regularly held, at which full information as to the progress of the liquidation was afforded and the proceedings substantially approved.

On July 15, 1908, an order for the winding up of the Ontario Bank was made on the petition of the Bank of Montreal as creditor and one Polson, a shareholder in the bank.

Notice of the proceedings which have given rise to this appeal was given on May 8, 1909.

It is not necessary to set forth at length all the clauses of the deed of October 13, 1906, on which the appellant founds his contention or to analyse its provisions. The deed seems to be quite in conformity with the resolution of the meeting of the directors held on October 13, 1906. In substance it adds nothing to the terms of that resolution beyond (1.) defining the remuneration of the Bank of Montreal, which may or may not have been settled when the Bank of Montreal agreed to take over the outside obligations of the Ontario Bank, and (2.) adding a provision for the payment by the Bank of Montreal in a certain event of a sum in respect of the goodwill of the Ontario Bank.

The deed of October 13, 1906, begins by setting forth a statement of assets and liabilities of the Ontario Bank as on September 29, 1906, and then, after a guarantee of the accuracy of that statement, it declares in clause 2 that—"In consideration of the premises the Bank of Montreal hereby agrees to purchase by way of discount and re-discount at the rate of six per cent. (6 per cent.) all the call and current loans and overdue debts of the Ontario Bank existing at the close of business on the 12th day of October A.D. 1906, the amount thereof to be ascertained as soon as possible, it being understood that the Bank of Montreal shall be entitled to the benefit of and immediate transfer of all and every security and securities held for all or any of such loans and overdue debts."

The deed ends by providing (clause 16) that—"If the terms and conditions of this agreement are capable of being and are, in fact, carried out by the Ontario Bank, as and in the manner herein contemplated and agreed then for the indirect benefit thereby accruing to the Bank of Montreal, it agrees to pay to the Ontario Bank or to allow and credit on the final adjustment of accounts the sum of one hundred and fifty thousand dollars ($150,000)."

The argument on the part of the appellant turned mainly on

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those two clauses. It was said that the use of the word "purchase" in clause 2 shews that there was a sale of at least part of the assets of the Ontario Bank within the meaning of the Bank Act, and that at any rate there was a sale of the goodwill, which, in reality, was the only asset the Ontario Bank possessed. It is, however, clear that the Bank of Montreal did not purchase or intend to purchase the call and current loans and overdue debts of the Ontario Bank for its own profit as a matter of bargain. Read in the light of the circumstances in which the deed was made, the expression merely means that those loans and debts were made over absolutely to the Bank of Montreal as the agents and attorneys of the Ontario Bank for the purpose of discharging that bank's obligations to its outside creditors. It cannot be doubted that on the construction of the deed if there had been any profit on that part of the transaction, which was most improbable, if not impossible, the profit would not have enured to the benefit of the Bank of Montreal.

As regards the payment in respect of goodwill, it is clear that there was no agreement on the part of the Ontario Bank to sell the goodwill or to bind itself to do or to forbear from doing anything in order to secure the goodwill (such as it was) to the Bank of Montreal, though no doubt the Bank of Montreal acquired an indirect benefit by taking upon itself and fulfilling the obligations of the Ontario Bank to its customers and taking over such of the premises of the Ontario Bank as it chose to purchase.

On the whole their Lordships agree with the Courts of Ontario in thinking that the deed of agreement of October 13, 1906, does not offend against the provisions of the Bank Act, and they will humbly advise his Majesty that the appeal must be dismissed.

The appellant will pay the costs of the appeal. The liquidator will have his costs as well as the Bank of Montreal.

Solicitors for appellant: *Blake & Redden.*
Solicitors for Bank of Montreal: *Bischoff & Co.*
Solicitors for Royal Trust Company: *Harrison & Powell.*

[PRIVY COUNCIL.]

ERIE COUNTY NATURAL GAS AND FUEL COMPANY, LIMITED, AND OTHERS . . . } DEFENDANTS;

AND

SAMUEL S. CARROLL AND ANOTHER . . PLAINTIFFS.

AND CROSS-APPEAL.

J. C. 1910 *July* 22, 25; *Dec.* 14.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Measure of Damages—Conveyance of Gas Leases and Wells—Reservation by Vendors of sufficient Gas to work their Plant—Construction—Breach—Substituted Gas obtained free of Cost—Nominal Damages.

By agreement and conveyance executed in April, 1891, by the plaintiffs and one of two appellant companies, and afterwards in 1894 assigned to the other of them, the plaintiffs, who carried on an extensive business of quarrying stone and burning lime on their property, sold, and the two companies successively acquired, various gas leases, gas grants, and gas wells theretofore held by the plaintiffs. These gas leases conferred on the holders the exclusive right to explore and drill the lands to which they related, but which were not demised thereby, for subterranean or natural gas which had been discovered to be useful both as an illuminant and as fuel, and to set up and use the necessary machinery for reducing the said gas into their possession and control. The transaction included the following clause :—"It is understood that the parties of the first part reserve gas enough to supply the plant now operated or to be operated by them on said property."

Shortly after the assignment of 1894 the assignee company cut off the supply of gas theretofore enjoyed by the plaintiffs under the said reservation clause and refused further supply; and the plaintiffs thereupon procured the gas required for their plant by the acquisition from independent sources of other gas leases and by the construction of works necessary to obtain the same.

In an action for damages caused by the deprivation of gas against both companies :—

Held, that on the true construction of the reservation clause the companies were successively bound to supply from the gas obtained by them to the plaintiffs a sufficient amount to operate their plant, varying according to its requirements.

Held, also, overruling the Court below, that the measure of damages

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* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD MERSEY.

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recoverable by the plaintiffs was the cost of procuring the gas to which they were entitled and not the price at which the substituted gas when procured could have been sold; and that, as they had sold the leases and works used in procuring the substituted gas for more than they cost, they were entitled only to nominal damages.

Le Blanche v. *London and North Western Ry. Co.*, (1876) 1 C. P. D. 286, approved.

CROSS-APPEALS from a judgment of the Court of Appeal for Ontario (April 5, 1909) affirming a judgment of Britton J. (December 9, 1907) which varied the Master's report made on a reference to assess damages sustained by the plaintiffs not having been permitted to take natural gas for the supply of their works, which they had reserved to themselves in their contract of sale of gas leases and wells to the defendants. The question decided was as to the measure of damages. The contract with the Erie appellant company, its assignment to the Provincial appellant company, its breach subsequent to assignment, and the course of litigation resulting in the said reference are detailed in the judgment of their Lordships.

The Master reported on April 20, 1891, that the true measure of damages was the market value of gas at the spot where the plaintiffs were entitled under the contract to get it, and found on the evidence that this market value was 12½ cents per 1000 cubic feet. The defendants contended that, as the plaintiffs had expended a sum of about $60,000 in the acquisition of other gas wells with which to supply fuel to their works and had sold these new gas wells at a profit when they sold their business in 1902, the true measure of damages was the cost to them of supplying themselves with gas less the profit they made on the resale of these gas wells. The Master, however, rejected this contention. He found that the plaintiffs had consumed gas between November 15, 1894, and August 1, 1902, from the wells which they had acquired, to the amount of 911,723,103 cubic feet (520,057,470 cubic feet for operating lime kilns and 391,665,633 cubic feet for operating other plant). In estimating the value of the gas the Master referred to the fact that the defendants actually sold the gas for from 12 to 15 cents per 1000 cubic feet, and he found that 12½ cents per thousand was a just and equitable price. Upon these figures the Master assessed the

damages at $113,965.29 as against the assignee company only, the breach having occurred after assignment, and the assignor company having had nothing to do with the damages sustained.

The assignee company and the plaintiffs appealed, and the High Court of Ontario on the evidence reduced the damages to $54,031.82 and directed that the damages so reduced should be recovered from both companies. It held that the measure of damages was the value of the gas at the point where the plaintiffs were entitled to get it, and not the expense of obtaining other wells.

The same parties appealed to the Court of Appeal, the Erie Company also appealing on the ground that damages should not have been assessed as against them. The majority of the Court thought that the finding of Britton J. as to the amount and value of the gas consumed by the plaintiffs was as nearly accurate as possible in the circumstances and affirmed his judgment. Meredith J.A. held that the plaintiffs were entitled to the value of the gas reserved to them under the contract, but that, as they had not in fact purchased gas and the quantity and value to which they were entitled was not easily ascertained, the best way to assess damages was to take the full cost of obtaining the gas to which the plaintiffs were entitled under their reservation and to deduct therefrom the price subsequently obtained for the wells.

Eldon Bankes, K.C., *W. M. Douglas, K.C.*, and *T. D. Cowper*, for the appellants, contended that this judgment was erroneous and should be reversed. The plaintiffs were not entitled to damages on the basis of being entitled to be paid for the value of the gas which they had consumed between 1894 and 1902; and if they were they had entirely failed to prove the amount consumed. The true measure of damages is what did it cost the plaintiffs to obtain the gas which they required in their works. Under their clause of reservation they were entitled to charge that cost against the appellants. The cost was that of obtaining new leases, drilling wells, and procuring the gas at the point where they were entitled to it. They did not procure it in order to sell again, and the market price was immaterial. They

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procured all they wanted, and their loss was measured by the cost of getting that which they were entitled to under their reservation. The evidence shewed that that cost was approximately $55,000, and as on the sale of their plant to the Empire Lime Company in 1902 they received $75,000 for their gas leases and wells, so far from incurring any loss, they had a margin of nearly $20,000 to the good, and were not entitled to the further damages decreed. Reference was made to the reports of this case in the Courts below in 26 Can. S. C. R. 181 and 29 Can. S. C. R. 591, and as to the measure of damages to *Le Blanche* v. *London and North Western Ry. Co.* (1)

J. A. Simon, K.C., *Glyn Osler*, and *Geoffrey Lawrence*, for the plaintiffs, respondents, contended that the majority of the judges were right in holding that the proper measure of damages was the market price of the gas at the time and place at which the plaintiffs were entitled to have it by virtue of the reservation clause in the contract. The amount of damages ought not to be affected by the result of that which was a new venture on the part of the plaintiffs and was not contemplated in their contract with the defendants. Whether that result was prosperous or disastrous was not a matter which affected the defendants, who were bound to make good to the plaintiffs the value of the gas which they ought not to have prevented them from taking for the supply of their works. Reference was made to *Rodocanachi* v. *Milburn* (2) as to the measure of damages, and to Mayne on Damages, 8th ed., pp. 21 and 215. In cross-appeal they contended on the evidence that the finding of the Master as to the amount of gas actually required for and consumed in operating the works was right. His rulings as to the construction and effect of the stipulation in question and as to the proper measure of damages, confirmed as they were by both Britton J. and the Court of Appeal, were right and should not be disturbed.

Bankes, K.C., in reply.

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Dec. 14.

The judgment of their Lordships was delivered by

LORD ATKINSON. In this case both the parties in an action in which Samuel S. Carroll and William E. Carroll were plaintiffs

(1) 1 C. P. D. 286, 298, 302. (2) (1886) 18 Q. B. D. 67, 76.

and the Erie County Natural Gas and Fuel Company, Limited, and the Provincial Natural Gas and Fuel Company, Limited, were defendants have lodged appeals against a judgment of the Court of Appeal of Ontario, dated April 5, 1909, whereby the appeal of the defendants against a judgment of the High Court of Justice of Ontario, dated December 9, 1907, delivered by Britton J., was dismissed, and this latter judgment affirmed.

By the judgment of December 9, 1907, the report dated April 20, 1907, of the local Master at Welland, made on a reference under an order of the judge presiding at the trial to assess damages, was modified, and damages to the amount of $54,031.82 awarded against the defendants.

The facts so far as they are relevant to the question arising for their Lordships' decision are as follows.

In the year 1889 a subterranean gas, commonly termed natural gas, useful both as an illuminant and as fuel, was discovered to exist in considerable quantity in the earth in certain districts in the county of Welland in the Province of Ontario.

The mode adopted for reducing this gas into possession, as it is phrased, is this: A pipe something over three inches in diameter is sunk into the ground by drilling until the gas field, lying generally about 800 feet below the surface, is reached and the gas supply thus tapped. A smaller pipe, usually about three inches in diameter, is then inserted into the larger pipe so sunk. Through this tubing the gas impelled by the pressure from below flows up into the air. To prevent it from being wasted a valve or cap is fitted to the tubing, and the structure is then known as a "gas well." When the gas is required for use a smaller pipe is attached to the well, and the gas is by this pipe conducted to its destination.

Those who may desire to obtain from gas-bearing lands belonging to others the natural gas such as above described usually obtain from the owners of the land, on terms agreed on between them, licences in writing called "gas leases," conferring upon the licensees the right to explore and drill the lands for gas and to conduct the gas when found from thence to such place as they may desire, and dispose of it as they may deem fit. The plaintiffs in the present action had obtained many such leases

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in the townships of Humberstone and Bertie in said county. One taken as a sample is printed in the record. It purports to demise and let "the exclusive right of drilling and operating for petroleum oil and gas" on the lands described, the "right of way over and across said premises, the right to lay pipes to convey oil and gas, providing a well is sunk on the premises, and the right to bring upon, erect or remove any machinery or fixtures required by the party of the second part," i.e., the licensee. But as far as appeared in this case none of them contained any demise or grant of land.

The plaintiffs, previous to the year 1891, carried on the business of quarrying stone and burning lime at Sherkston, in the county of Welland, on a somewhat extensive scale. They had two kilns; but in 1891, at the date of the agreement hereinafter mentioned, only one of these was actually in use. Before 1890 they had used wood and coal as fuel in these kilns, but after the discovery of natural gas they used the latter as fuel exclusively. In April, 1891, they had sunk, and had flowing, four of the above-described gas wells. On April 6, 1891, the plaintiffs entered into an agreement with the Erie County Natural Gas and Fuel Company, Limited, whereby they agreed to sell to the company for the considerations therein mentioned "all gas leases now held by them" in these townships, and also "all gas grant franchises issued to and now owned by them in the Dominion of Canada, and also the gas wells now on said leases"; the plaintiffs binding themselves to put down five gas wells properly located on the property within the townships referred to in said leases, and the company on its side undertaking to "cause the necessary mains and pipes of suitable size to be laid to connect said wells and deliver said gas at the city of Buffalo" and to distribute the same to the consumers thereof in that city. This agreement was signed by the plaintiffs, by George Bork, the secretary of the company, and by Gerhard Lang, its president, and bore the corporate seal of the company.

It contained the clause following:—"It is understood that the parties of the first part" (i.e., the plaintiffs) "reserve gas enough to supply the plant now operated or to be operated by them on said property."

The plaintiffs on April 20 in the same year executed what purported to be an assignment, or conveyance on sale, to the company of all the gas leases and franchises mentioned in the agreement of April 6, enumerating the leases in detail, but not containing any reservation of gas to the plaintiffs, such as that contained in the latter document. From the month of April, 1891, to the month of July, 1894, the aforesaid company permitted the plaintiffs to draw, at first from the gas well Schesler No. 1 and subsequently from the pipes or mains laid down by the company in pursuance of their agreement, gas sufficient to supply the plant operated by the plaintiffs.

On July 18, 1894, the above-mentioned company, by indenture of that date, conveyed to the Provincial Natural Gas and Fuel Company, Limited, one of the defendants, all its gas wells and franchises in the Province of Ontario, including those purchased by the first-mentioned company from the plaintiffs, and all machinery and plant belonging thereto.

Shortly after the execution of this conveyance the Provincial Company cut off the supply of gas theretofore enjoyed by the plaintiffs, and refused to permit them to take or be supplied with any gas from their pipes or mains or gas wells.

The plaintiffs on July 24, 1894, instituted an action in the Supreme Court of Ontario against the Provincial Company, claiming in effect an injunction to restrain the latter from preventing the plaintiffs from taking as theretofore from the pipes laid by the Erie Company the gas required for their works.

The Provincial Company pleaded, inter alia, that the assignment of April 20, 1891, had superseded the agreement of the 6th of the same month, and that the plaintiffs were therefore not entitled, as against the Provincial Company, to be supplied with the gas claimed. This plea was upheld by the trial judge as a sufficient answer to the suit of the plaintiffs. On appeal to the Court of Appeal for Ontario, that Court was equally divided in opinion, and the decision appealed from thus stood affirmed.

Shortly after, namely, on July 20, 1896, the action out of which the present appeals have arisen was instituted by the plaintiffs against both the aforesaid companies, claiming that the

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assignment or conveyance of April 20, 1891, might be reformed by the insertion therein of a provision securing to the plaintiffs a supply of gas sufficient to operate their works, and to recover damages in respect of the deprivation of that supply to which they claimed to have been entitled.

The case was tried before Armour J. without a jury. He, on April 28, 1897, gave judgment directing that the deed of April 20, 1891, should be reformed, as of its date, by inserting therein, before the attestation clause, the reservation clause contained in the agreement of April 6 hereinbefore extracted, thereby bringing the two instruments into conformity with each other, and he referred it to the Master at Welland as already mentioned to ascertain and report what damages, if any, the plaintiffs had sustained by being deprived of the use, in manner already mentioned, of the gas necessary to operate their plant. The learned judge did not put any construction on the clause so decreed to be inserted, but merely decided that the plaintiffs were entitled to have it inserted, quantum valeat, into the deed of April 20.

The defendant companies appealed from this judgment and decision to the Court of Appeal for Ontario. That Court on October 3, 1898, allowed the appeal and dismissed the action of the plaintiffs. On appeal by the plaintiffs to the Supreme Court of Canada this last-mentioned judgment and decision were on June 5, 1899, reversed and the judgment of the trial judge restored. By an Order in Council of Her late Majesty Queen Victoria, dated January 11, 1900, leave to appeal from this judgment of the Supreme Court of Canada was refused. The plaintiffs did not proceed upon the reference to the Master till January 20, 1905, who did not report till April 20, 1907. Meanwhile the plaintiffs, in order to obtain gas sufficient to operate their plant, took gas leases from various persons owning gas-bearing lands in their neighbourhood, drilled wells, bought and laid down pipes, and executed such other works as were necessary to procure from independent sources gas sufficient for their purposes. They did not require the gas, and did not use it, for any purpose other than to supply their plant.

In their statement of damages the plaintiffs set out in detail

the different items of their expenditure on their works year by year, from November 15, 1894, amounting altogether to $58,297.52, which, according to the evidence of H. E. Martin, their bookkeeper, included the rent or sum paid for permission to sink the newly-acquired wells. The accuracy of this account does not appear to have been questioned in any part of the proceedings. And it was not suggested that the gas actually extracted from the property comprised in the leases assigned to the defendants was not amply sufficient to operate at all times the plaintiffs' plant, or that the means thus adopted by the plaintiffs to supply their needs were not, in themselves, reasonable under the circumstances.

An agreement in writing, dated July 23, 1902, was entered into between the plaintiffs and one Fuller for the sale to the latter of the Canadian and Buffalo properties of the plaintiffs for the sum of $250,000. It contained clauses to the following effect:—

(1.) That the purchase price of $250,000 should carry with it and include all the plant and appurtenances as well as the leases on said quarry properties which Carroll Brothers then operated in Canada, and also the plant and appurtenances owned and used by them in Buffalo; and

(2.) That the said Carroll Brothers were also, for the consideration above expressed, to convey or secure and cause to be conveyed to the said Fuller the fee and title to the lands in Canada then occupied and used by them under leases within one year from the date thereof.

To more effectually carry out this purchase and sale a conveyance bearing date August 1, 1902, was executed by the plaintiffs under hand and seal. By it they purported to convey to Fuller the "entire plants used" by them for the production and marketing of stone, quicklime, and sand situated in the Dominion of Canada and in the city of Buffalo, and it contained a clause setting out in detail what the plant in Canada was agreed and understood to consist of, one of the items being "sixteen producing gas wells, two wells being drilled, with main line and connections."

In the course of the negotiations for this sale, the plaintiffs

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wrote to Fuller a letter containing a list of their plant in Canada corresponding exactly with the details set forth in the deed of conveyance, and opposite to that plant is set down the sum of $194,600. A list of the Buffalo plant is set out in similar detail, and opposite to it is set down the sum $61,600, making together with the former the sum of $256,200. The letter begins with the following passage: "The following is a list of our plant. There may be a few things left out. However, there is enough to show that price named you was very low," i.e., the price of $250,000. The very first item in the list of the Canadian plant is the following: "Sixteen producing wells, two wells being drilled, with main line and connections, $75,000.00."

It is quite true that the plaintiffs are not estopped by that statement. They might, when cross-examined on the matter as they were, have explained away its significance if they could; but unless it be explained away it is impossible to contend that in the purchase price, $250,000, they did not receive something reasonably approaching $75,000 in respect of the works they had constructed at a cost of less than $60,000. Even if the sum of $6200, the excess of the total sums named in this letter over the purchase price of $250,000, were deducted exclusively from the above-mentioned sum of $75,000, it would still leave $68,800 as the price for which those works were sold. The outlay upon them was gradual. According to the statement of damages before referred to, over $20,000 was expended in the years 1898 and 1899, and close upon $24,000 in the years 1901 and 1902. No calculation was made as to what the interest at a reasonable rate upon that outlay would amount to. It could scarcely amount to $13,000. That this is plain appears from the examination of Martin.

Samuel Carroll was cross-examined on this item, and W. E. Carroll also. They give their explanation. It is quite unconvincing; entirely deserving the criticism passed upon it by the presiding judge. In their Lordships' opinion it in no way lessens the force of the item of $75,000 appearing in the letter.

The Master by his report, dated April 20, 1907, found:—

1. That the plaintiffs were entitled to have the works operated by them supplied with natural gas from the mains of the Provincial Company from November 15, 1894, to August 1, 1902.

2. That the company consumed 911,722,303 cubic feet of their own gas for that purpose within the above-mentioned period.

3. That this gas was worth 12½ cents per 1000 cubic feet, amounting to $113,965.29 in all, which sum he found the Provincial Company (not both the companies) liable to pay to the plaintiffs. The result in money if this award held good would, if the figures $60,000 and $75,000 be accurate, be something like this.

If the defendants had discharged their obligation the plaintiffs would have got from them gas presumably sufficient to operate their plant without paying for it anything extra. The defendants, however, failed to discharge that obligation for about 7¾ years, and the plaintiffs by constructing works at a cost of less than $60,000 procured the necessary gas from elsewhere. After having this gas and worked their plant they sold these works presumably for $75,000, about $15,000 more than they cost; yet, because of the temporary default of the defendants, the plaintiffs are, notwithstanding their use and enjoyment of the substituted gas, to receive in addition the sum of $113,965.22 as damages, thereby making a profit by the defendants' breach of their obligation of about $128,965.22, a somewhat grotesque result.

Britton J. in delivering the judgment of the Supreme Court of Ontario apparently approved of the principle upon which the damages were assessed by the Master, and agreed with him as to the price at which it should be taken that the plaintiffs could have sold the gas which they had used, namely, 12½ cents per 1000 cubic feet, but thought the quantity found by the Master to have been produced was excessive, and reduced the damages to $54,031.82, less than half the sum at which they had been assessed by the Master. The Court of Appeal concurred in opinion with him, affirmed his judgment and decision, and dismissed the appeal of the defendants and the cross-appeal of the plaintiffs with costs.

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Their Lordships are quite unable to adopt these conclusions. In their opinion they are erroneous; and they think the error is due to the fact that the Court of Appeal did not take a true view of the nature of the transaction embodied in the agreement of April 6, 1891, and the conveyance of the 20th of the same month as amended, or of the rights which in the circumstances of the case sprung from it.

It is plain, on the face of these documents, that the parties to them contemplated that more gas should be obtained from the properties leased than would be sufficient to operate the plant of the plaintiffs, and the reservation contained in the agreement and subsequently embodied in the conveyance merely amounts, in their Lordships' opinion, to a contract on the part of the Erie County Natural Gas and Fuel Company to supply the plaintiffs, out of this larger volume of gas, with sufficient to operate their plant. Upon the execution of the conveyance of July 18, 1894, that contract of course became binding on the defendants, the Provincial Natural Gas and Fuel Company, Limited; but the amount of gas to be supplied was not specifically fixed. In the nature of things it would almost necessarily vary, as the operation of the plant varied in intensity or amount. No portion of the gas had ever been specifically set apart for or appropriated to the plaintiffs' use, or had ever become their property. Had the plaintiffs without the consent of the defendants tapped the latter's mains and helped themselves, they would, according to *The Queen* v. *White* (1), a case of the highest authority, and *The Queen* v. *Firth* (2), have been liable to be convicted of larceny, and certainly would have been liable in trover. They were merely in the position of a person who had, for instance, purchased from the owner of a large quantity of grain in bulk a portion of it, while the portion purchased remained part of the bulk and before it had been in any way set apart or identified. The defendants have admittedly broken their contract. They are liable for damages for that breach. The only question for decision is what, in the circumstances of the case, is the true measure of those damages. It would have been competent for the plaintiffs to have abstained from procuring

(1) (1853) 22 L. J. (M.C.) 123. (2) (1869) L. R. 1 C. C. R. 173.

gas in substitution for that which the defendants should have supplied to them, and have sued the defendants for damages for breach of their contract. They did not take that course. They chose to perform on behalf of the defendants, in a reasonable way, that contract for them and to obtain from an independent source a sufficient quantity of gas, similar as near as might be in character and quality to that which they were entitled to receive. In such cases it is well established that the measure of damages is the cost of procuring the substituted article, not at all the price at which the substituted article when procured could have been sold by the person who has procured it. In *Hamlin* v. *Great Northern Ry. Co.* (1) Alderson B. thus lays down the law applicable to these cases: "The principle is that if the party does not perform his contract the other may do so for him, as near as may be, and charge him for the expenses incurred in so doing." In *Le Blanche* v. *London and North Western Ry. Co.* (2) Lord Esher (then Brett L.J.) thus expresses himself: "We think it may properly be said that if the party bound to perform a contract does not perform it the other party may do so for him, as reasonably near as may be, and charge him for the reasonable expense incurred in so doing," but whether the thing done was a reasonable thing to do must be determined having regard to all the circumstances. James, Mellish, and Baggallay L.JJ. expressly approve of the principle laid down by Alderson B., with this qualification, however, that the second party must not take a course which as regards the party in default would be unreasonable or oppressive. This principle appears to be generally accepted and applied: Sedgwick on Damages, 8th ed., vol. 1, pp. 322—325.

Where the contract is one for the sale of goods one of the modes in which a party to it may, on the default of the party bound to perform it, perform it for him is by going into the market and buying goods of a description and quality similar to those contracted for; but if he purchases at a sum equal to or less than the contract price, he can only recover nominal damages, because, the cost of procuring the substituted article not being greater than the contract price, he has got goods equal

(1) (1856) 26 L. J. (Ex.) at pp. 20, 23. (2) 1 C. P. D. at p. 302.

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to those contracted for and at the same or a less cost, and has therefore suffered no loss: *Valpy* v. *Oakeley* (1); *Griffiths* v. *Perry*. (2) The case of *Western Wagon and Property Co.* v. *West* (3) is an illustration of the same principle.

The same rule must apply whether the substituted goods or commodities are manufactured, or mined for, or otherwise produced, or purchased in open market. In the latter case the cost of procuring the goods is the price at which they were bought; in the former cases the cost of procuring them is the cost of their production. The method adopted to procure them cannot make any difference.

If then the cost to which the plaintiffs were put to acquire gas to operate their plant during the $7\frac{3}{4}$ years mentioned be the true test of damages in this case, as it clearly is, the next question to consider is what have the plaintiffs shewn to be the amount of the initial gross cost to which they were put, and what deductions, if any, the defendants have shewn should be made from that amount in order to ascertain the net cost, and consequently the actual loss, and therefore the sum recoverable. The plaintiffs have vouched expenditure to the amount of $58,297.52 in their before-mentioned statement of damages, and it was stated by Mr. Eldon Bankes, and not disputed, that this amount covered labour, materials, and sums paid for superintendence. The answers to certain questions in the record would go to shew that it included the expenses of the plaintiffs. It is not suggested that it included interest on the money spent. It may possibly not have included maintenance. A reference to the statement of damages shews that the main expenditure took place in the years 1898 and 1902. Even if the outlay be taken at $60,000, the interest at 5 per cent. on the different sums expended from the dates given in evidence could not, as has been already pointed out, well exceed $12,000, but that is a mere matter of arithmetic which could be readily ascertained. If these works cost the plaintiffs more than this it was their business to shew it. They cannot be permitted to recover damages on guesswork or surmise. They have failed

(1) (1851) 16 Q. B. 941. (2) (1859) 1 E. & E. 680.
(3) [1892] 1 Ch. 271.

to shew it. Mr. Simon, on their behalf, contended that as the defendants by their conduct had compelled the plaintiffs to become producers of gas, they are bound to pay the latter for their courage and enterprise. There is no authority for such a proposition. The contention is in their Lordships' opinion unsound. It may well be that if several reasonable but abortive attempts had been made to procure this gas the cost of these would have been properly treated as part of the cost of ultimately obtaining it, but that question does not arise in the case. The works having admittedly been sold, something must have been obtained for them. It is clear that if the defendants are to pay for the cost of making those works and of thereby supplying the plaintiffs with the gas the works produced they must get credit for the sum for which these works, after having supplied the gas, were sold, otherwise the plaintiffs would make by the defendants' breach of contract a profit equal to the price obtained on sale. It was therefore the business of the plaintiffs to shew how much that something was. The prima facie inference to be drawn from a document printed in the record is that $75,000 was the amount of it. That inference, unless rebutted, should in justice to the defendants be acted upon. The burden of rebutting it lay upon the plaintiffs. They have, in their Lordships' opinion, failed to discharge that burden, and should not be permitted, by leaving the matters in obscurity, to recover more than they have lost. The plaintiffs have not sued for the loss of their contract. They have only sued for the damages caused to them by the temporary deprivation of the gas. They have got the substituted article, identical in description and quality, have used it, and have failed to shew that it has not in the result been obtained by them free of cost. They are therefore, according to the principles established by the authorities already cited, only entitled to nominal damages.

Their Lordships therefore think that the defendants' appeal should to this extent be allowed with costs, and the plaintiffs' cross-appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Harrison & Powell.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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BANK OF MONTREAL . . . . . APPELLANTS;

AND

JANE JACQUES STUART AND ANOTHER . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Upper Canada—Husband and Wife—Undue Influence—Duty of Solicitor acting for the Wife—Wife's Title in Equity to Relief.

In an action by a wife living with her husband against the appellant bank to set aside a series of transactions in relation to a company spreading over eight years and resulting in her surrendering to the bank all her extensive estate, real and personal, and in her being left without any means of her own, it appeared that the plaintiff, who was a confirmed invalid, acted throughout in passive obedience to her husband's directions, had no means of forming an independent judgment, and at the trial repudiated any misrepresentation or undue influence by her husband, alleging that she acted of her own free will to relieve her husband's distress; and that the solicitor who acted in all or most of the transactions was solicitor to the bank and to the husband, and was a director, secretary, shareholder, and creditor of the company:—

Held, affirming the judgment of the Supreme Court but for different reasons, that these transactions could not stand, the wife being in fact wholly under the husband's influence and the solicitor in a position in which he could not advise fairly.

Cox v. *Adams*, (1904) 35 Can. S. C. R. 393, so far as it holds that no transaction between husband and wife for the husband's benefit can be upheld unless the wife is shewn to have had independent advice, disapproved.

APPEAL by special leave from a judgment of the Supreme Court of Canada (April 5, 1909) reversing by a majority a judgment of the Court of Appeal for Ontario (November 10, 1908) which affirmed a judgment of the High Court for Ontario (December 10, 1907) dismissing the appellants' action.

On December 7, 1906, the respondent Jane Jacques Stuart brought her action under the circumstances stated in their Lordships' judgment, alleging that, her husband the respondent John

* *Present:* LORD MACNAGHTEN, LORD COLLINS, LORD SHAW OF DUNFERMLINE, and SIR ARTHUR WILSON.

Stuart being with others liable to the appellants as the indorser of a promissory note made by the Maritime Sulphite Company, Limited, of Chatham, New Brunswick, for the sum of $175,000, the appellants procured the respondent John Stuart to obtain, and the said respondent did obtain, from the respondent Jane Jacques Stuart—(1.) a guarantee, dated February 24, 1896, whereby the respondents jointly and severally guaranteed to the appellants to the extent of $100,000 repayment of advances by the appellants to the said company. (2.) An assignment, dated July 14, 1896, to the appellants or to trustees on their behalf of mortgage securities on real estate the property of the respondent Jane Jacques Stuart to the amount of about $26,000. (3.) A further guarantee, dated April 11, 1898, whereby the respondents increased the extent of their guarantee of February 24, 1896, to $125,000. (4.) A charge and mortgage, dated October 2, 1903, in favour of the appellants of certain lands and premises, stocks and shares, as collateral security for the indebtedness of the respondent John Stuart to the appellants. (5.) A grant release and conveyance, dated July 20, 1904, to the appellants of all the right, title, and interest of the respondent Jane Jacques Stuart to and in the premises mentioned in the above sub-paragraphs (2.) and (4.).

The plaintiff alleged that the appellants, by threats, intimidation, and undue influence, procured the respondent John Stuart to exercise his will, dominion, and influence over her (his wife) to induce her to sign the said guarantees, agreements, and transfers, and that he was the agent of the appellants in so doing. She also alleged that she had received no consideration for making the said guarantees, agreements, and transfers, and, as the appellants well knew, had no independent advice with regard to the same; and claimed a declaration that they were null and void as against her, and an account and payment by the appellants of the proceeds of such of the said securities as they might have realized.

The appellants denied that they had procured the respondent John Stuart to obtain any of the said guarantees, agreements, or transfers from his wife, or that she was induced to sign the same by any exercise of will, dominion, or influence over her by

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the respondent John Stuart. They alleged that the wife relied upon independent legal advice, and that they, the appellants, had upon the faith of the said guarantees, agreements, and transfers advanced large sums of money and otherwise altered their position to their detriment. The appellants also pleaded that in the event of an account being ordered the respondent John Stuart was a necessary party.

The trial judge (Mabee J.) dismissed the action. He held that independent advice was unnecessary to validate the transactions in question; that there had been no fraud or misrepresentation, and that the wife had made the conveyances and transfer with full knowledge of the facts.

In the Court of Appeal and by its direction the husband was added as a party defendant. He admitted his wife's right to the relief claimed by her and submitted, if the Court should think fit, to have the release of his liability to the appellants which was contained in the deed of July 20, 1904, set aside.

In the result the Court was equally divided, Moss C.J. and Garrow J. being in favour of the appeal. They proceeded on the footing that undue influence had been practised by the husband; that there was no independent advice and no one who occupied an independent position who could form a proper judgment and was competent to advise the plaintiff and explain the position to her. Osler and Maclaren JJ. found on the evidence that the plaintiff was a person capable of forming and acting on her own uncontrolled opinion and had so acted, independent advice being unnecessary.

The Supreme Court (Idington J. dissenting) ordered the case to be disposed of in the manner proposed by Moss C.J. They accordingly declared that the said guarantees, assignments of mortgage, and other transfers were not binding upon the plaintiff as between her and the appellants, and directed that there should be a further trial of the action in respect of the ownership as between the plaintiff and the respondent John Stuart of the real and personal property assigned and conveyed to the appellants by the impeached instruments, and that as to so much of the property as was owned by the wife the appellants should restore the same to her or account to her for

the value thereof. They considered that the judgment of a majority of that Court (when differently constituted) in the action of *Cox* v. *Adams* (1) was conclusive of the appeal, and it was on this ground that the appeal was allowed.

Sir R. Finlay, K.C., and *Hugh C. Bischoff*, for the appellants, contended that *Cox* v. *Adams* (1) did not apply and was, moreover, wrongly decided. The mere relation of husband and wife does not render the doctrine of *Huguenin* v. *Baseley* (2) applicable. It is necessary to shew, in order to set aside a transaction into which a married woman has entered in favour of her husband, that she was in fact deceived or misled. In *Cox* v. *Adams* (1) there was an absence of good faith and the married woman did not properly understand the transaction. The legislation in Ontario is inconsistent with the idea that the doctrine of *Huguenin* v. *Baseley* (2) applies to the relation of husband and wife. The provisions of the Married Women's Property Act, R. S. O., 1887, c. 132, were in force when the guarantee of 1896 was given. That Act and the present Married Women's Property Act, R. S. O., 1897, c. 163, as to a married woman's power of contracting are substantially the same as the English Married Women's Property Act, 1882. For the Ontario legislation, see Cons. Stat. Upper Canada (1859), c. 85; Ontario, 32 Vict. c. 9; 34 Vict. c. 24; 36 Vict. c. 18 (re-enacted with immaterial amendments by R. S. O., 1877, c. 127). See also R. S. O., 1887, c. 134, and R. S. O. 1897, c. 165. It was contended that the plaintiff's evidence shewed that when the first guarantee was given she knew that her husband was largely interested in the financial prosperity of the company and that her son was its manager. She knew that the bank was expected to make large advances on the faith of her guarantee, and she intended that it should do so and meant her guarantee to be the inducement. The Courts below were quite right on the evidence in finding that no misrepresentations of any kind were made to her, and that there was no element of fraud in the transactions. The bank entirely changed its position on the faith of the guarantee and transactions complained of, and it would be inequitable to set

(1) 35 Can. S. C. R. 393. (2) (1807) 14 Ves. 273.

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them aside. The relationship of husband and wife did not impose on the bank the duty of seeing that the wife had independent advice. Reference was made to *Barron* v. *Willis* (1); *Bischoff's Trustee* v. *Frank* (2); *Howes* v. *Bishop* (3); *Powell* v. *Powell* (4); *Grigby* v. *Cox* (5); *Pawlet* v. *Delaval* (6); *Field* v. *Sowle* (7); *Page* v. *Horne* (8); *Nedby* v. *Nedby* (9); *Hudson* v. *Carmichael* (10); *Hargreave* v. *Everard* (11); *Rhodes* v. *Bate* (12); *Parfitt* v. *Lawless.* (13)

Danckwerts, K.C., J. A. Simon, K.C., and *W. J. Elliott,* for the plaintiff, respondent, contended that she had been to the knowledge of the appellants induced to execute the documents impeached in this suit without any independent advice and without being made acquainted with the true position of affairs. The evidence shewed that the position of the company was hopeless as far back as 1896. It was vital to the company that money should be found, but those interested in the company either would not or could not advance or guarantee it. The only persons capable of advising the wife who took part in the transactions with her were her husband and the bank's solicitor. The latter was to the knowledge of the bank the friend, solicitor, and confidential adviser of the husband, also a director and secretary of the company, and to some extent a guarantor of its debts. He was personally interested in obtaining the guarantees, and yet the bank employed him to obtain them and prepare the necessary documents. The evidence shewed that the plaintiff exercised no independent will of her own, but was completely under the dominion of her husband aided by his solicitor, and without any independent advice and assistance in forming her own judgment. She received no benefit from any of the transactions, but was in the end denuded of all her estate; and the bank had through its solicitor complete notice of all the circumstances. Reference was made to *Billage* v. *Southee* (14);

(1) [1900] 2 Ch. 121; [1902] A. C. 271.
(2) (1903) 89 L. T. 188.
(3) [1909] 2 K. B. 390.
(4) [1900] 1 Ch. 243.
(5) (1750) 1 Ves. Sen. 517.
(6) (1755) 2 Ves. Sen. 662.
(7) (1827) 4 Russ. 112.
(8) (1848) 11 Beav 227.
(9) (1852) 5 De G. & Sm. 377.
(10) (1854) Kay, 613.
(11) (1856) 6 Ir. Ch. Rep. 278.
(12) (1865) L. R. 1 Ch. 252.
(13) (1872) L. R. 2 P. & D. 462, 468.
(14) (1852) 9 Hare, 534, 540.

Tate v. *Williamson* (1); *Cooke* v. *Lamotte* (2); *Hoghton* v. *Hoghton* (3); *Turnbull* v. *Duval* (4); *Smith* v. *Kay* (5); *Allcard* v. *Skinner* (6); *Rhodes* v. *Bate* (7); *Bainbrigge* v. *Browne* (8); *Fowler* v. *Wyatt* (9); *Powell* v. *Powell* (10); *Turner* v. *Collins* (11); *Wright* v. *Carter*. (12)

Sir R. Finlay, K.C. in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The action which has given rise to this appeal was brought by Mrs. Stuart, a married lady living with her husband, the respondent John Stuart, against the Bank of Montreal with the object of setting aside a series of transactions in connection with a pulp and paper company, known as the Maritime Sulphite Fibre Company, Limited, in which she became involved at the instance of her husband for his accommodation and for the accommodation and benefit of his associates.

The company and its shareholders, who were only five in number, were at the time under heavy liabilities to the bank. Mr. Stuart himself had no available means. Everything he had was embarked or sunk in the company.

The transactions in question began by Mr. Stuart, who was impecunious and strangely sanguine, offering his wife as security to the bank for some further advances which his associates, more solvent and less hopeful, were unwilling to guarantee. They ended in the transfer to the bank of everything Mrs. Stuart possessed, so that in 1904 she was, as the bank was informed by its solicitor, "absolutely cleaned out."

The trial judge dismissed the action with costs, holding in effect that Mr. Stuart exerted no undue influence over his wife, that she perfectly understood what she was doing and acted on her own uncontrolled judgment, and that no unfair advantage was taken of her. The learned judge was prepared to hold that

(1) (1866) L. R. 2 Ch. 55, 61.
(2) (1851) 15 Beav. 234, 240.
(3) (1852) 15 Beav. 278, 299.
(4) [1902] A. C. 429.
(5) (1859) 7 H. L. 750, 779.
(6) (1887) 36 Ch. D. 145, 158, 171, 181, 190.
(7) L. R. 1 Ch. 252.
(8) (1881) 18 Ch. D. 188.
(9) (1857) 24 Beav. 232, 238.
(10) [1900] 1 Ch. 243.
(11) (1871) L. R. 7 Ch. 329, 338.
(12) [1903] 1 Ch. 27.

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Mrs. Stuart received ample consideration for the liability she undertook, though he did not rest his decision on that ground.

In the Court of Appeal for Ontario, which consisted of four members, two learned judges agreed with the trial judge. Garrow J. thought that Mrs. Stuart was entitled to relief having regard to the peculiar facts and circumstances of the case. The learned Chief Justice also thought that Mrs. Stuart was entitled to relief, but he based his judgment on the case of *Cox* v. *Adams* (1), in the Supreme Court of Canada, which decided, or was supposed to have decided, that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shewn to have had independent advice. As the Court was equally divided, the judgment of the Court below was affirmed.

On appeal to the Supreme Court of Canada, which consisted of five judges, one was for dismissing the appeal; the other four learned judges held that the case was concluded by *Cox* v. *Adams* (1) and pronounced judgment in favour of the plaintiff. From that judgment the Bank of Montreal obtained special leave to appeal to His Majesty in Council.

Their Lordships do not think that the doctrine supposed to be laid down in *Cox* v. *Adams* (1) can be supported, and in fact no attempt to support it was made by the learned counsel at the Bar who appeared for Mrs. Stuart. On the other hand, their Lordships are compelled to take a view of the facts and circumstances of the case very different from that which commended itself to the trial judge and the learned judges who agreed with him.

Mrs. Stuart was the only child of Mr. John Jacques, a wealthy manufacturer in Toronto. In 1856 she married Mr. Stuart, who was the head of a wholesale grocery business in the city of Hamilton and became vice-president, and afterwards president, of the Bank of Hamilton.

No settlement was made on Mrs. Stuart's marriage. But in 1873 her father bought for her a residence near the city of Hamilton, called Inglewood. It is described by the manager of the Bank of Montreal at Hamilton as "a large house" with

(1) 35 Can. S. C. R. 393.

"extensive grounds" and stated to be "assessed at $35,000." It was conveyed to Mr. Stuart in fee simple. In 1875, at the request of Mrs. Stuart's father, Mr. Stuart executed a deed declaring that the property had been bought in trust for his wife, and that he stood seised thereof for her sole and separate use free from his control and engagements.

In 1886 Mrs. Stuart's father died. He left everything to his daughter, and made her executrix with a gentleman who declined to act. Under his will Mrs. Stuart became entitled to property of the value of $250,000 or thereabouts. The will is not in evidence, but it is common ground that all the property which she derived from her father was her separate estate. From her father's death Mr. Stuart assumed the entire management of his wife's property.

Throughout the transactions which are impeached in this action Mr. Alexander Bruce, Q.C., was the solicitor for the Bank of Montreal. He was also, during the earlier part of the transactions, Mr. Stuart's solicitor. He had been solicitor for a railway company of which Mr. Stuart was president, and was thus, as he says, "brought in contact with him a great deal." He admits that "undoubtedly" he was "the personal solicitor or personal legal adviser" of Mr. Stuart, adding, however, that he thought that he was not so in everything. But it is not suggested that in these transactions until July, 1904, Mr. Stuart had any other solicitor or legal adviser.

In 1886 Mr. Stuart, who was then worth some $250,000 of his own, became interested in the Sulphite Company. At his suggestion Mr. Bruce joined him in the venture. Mr. Stuart became president and Mr. Bruce a director and secretary of the company. Its works were at Chatham, New Brunswick. From the first the company seems to have been unsuccessful. Never once apparently during its struggle for existence did it pay any dividends on its shares or any interest on its bonds. Its nominal capital originally was $100,000. In 1891 it owed $275,000 to the bank. In that year it obtained a special Act of Parliament authorizing the issue of preference shares and bonds. The preference as well as the ordinary or common shares were all shares of $100 each. The only shareholders in the company at

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the time were Mr. Stuart, Mr. Bruce, Mr. A. B. Lee, Mr. Leys, since deceased, and a Mr. Brown. The company created and issued a thousand preference shares which were all taken by the five shareholders and paid up in full. The proceeds were handed over to the Bank of Montreal. By this payment the debt to the bank was reduced to $175,000, which was guaranteed by bonds of the company and a promissory note for $100,000 executed by the company and by Mr. Stuart. Mr. Stuart received a counter-guarantee signed by the other shareholders for different amounts under which Mr. Bruce became liable for $26,500. The benefit of the counter-guarantee was assigned over to the bank.

At the end of the year 1895 the company was in great straits. It owed $100,000 to the Bank of Hamilton, and another sum of $100,000 to the Bank of Montreal, in addition to the old debt of $175,000, which in the beginning of 1896 amounted with interest to $196,052. For each of the two sums of $100,000 Mr. Lee and Mr. Stuart were jointly and severally liable. It was then proposed by Mr. Stuart that he should pay the $100,000 owing to the Bank of Hamilton, and that Mr. Lee should pay the $100,000 owing to the Bank of Montreal, and that the bank should be asked to find further advances, which it was thought the bank would be willing to make on the security of materials in the hands of the company. Mr. Lee fell in with the proposal and paid the Bank of Montreal $100,000. Mr. Stuart, whose means were then exhausted, discharged the $100,000 owing to the Bank of Hamilton by getting his wife to sign a note for $125,000 as for a loan to her. The Bank of Hamilton discounted the note and Mr. Stuart paid it out of his wife's moneys.

The Bank of Montreal, it seems, was willing to allow the Sulphite Company to overdraw to the amount of $50,000, which it was supposed would be sufficient for its immediate needs. But the bank declined altogether to make any further advances without the personal security of the shareholders in the company. "It seems to me," said Mr. Macnider, a principal official of the bank writing for the general manager to Mr. Stuart, "too absurd that the bank should be expected to take a risk that the individuals immediately interested hesitate to guarantee." He added, "our communications about the working of the account

have always been with you and Mr. Bruce, and I shall be glad to hear that you have arranged to complete the guarantee necessary to enable us to establish the credit in Chatham, for judging from the telegrams we receive from our manager there it cannot be arranged too soon for the convenience of your people."

Thereupon Mr. Bruce prepared a guarantee for $50,000 limited to future advances. He signed it himself and sent it to Mr. Stuart for his signature and the signature of Mr. Lee. Mr. Lee hesitated and required time to consider his position. Then it occurred to Mr. Stuart, who had just dissipated half his wife's fortune in satisfying the claim of the Bank of Hamilton, to offer his wife as a guarantor to the Bank of Montreal. He did so in the following letter addressed to Mr. Macnider :—

"The Maritime Sulphite Fibre Company (Limited),
Chatham, New Brunswick, Canada.

"A. Macnider, Esq.,
Bank of Montreal.

"Hamilton,
6th February, 1896.

"Dear Sir,

"I met Mr. Lee yesterday on my way home, but owing to our train being late I had not much time to talk to him. I wrote to him, however, and put the matter before him, fully intending to follow the letter by going to Toronto to see him this afternoon. I have concluded to defer this for a day or two as it seemed to be pressing him too hastily for a decision on a matter somewhat complicated as well as important. He said to me that he must consult with some parties, and required some time for consideration himself after hearing what I proposed. He, however, knows now the $50,000 mentioned in the guarantee will not be sufficient to carry us through, and when we meet I expect him to be prepared to discuss terms on which if he prefers it, I shall find a surety to take his place. I explained to him as to you, the pressing necessity for relief in money matters at Chatham during the next few days, and he promised not to delay decision a day longer than can be avoided.

"Matters therefore stand thus : Mr. Lee will either sign the guarantee in a day or two, or agree with me for a substitute. In

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the latter case my wife will join me in the guarantee, and I now submit her name to you for that purpose. As I told you her means are ample enough to secure payment for a much larger sum than we contemplate requiring now or in future.

. . . . . .

"I am,

"Yours respectfully,

"John Stuart."

In his reply of February 7, 1896, Mr. Macnider observed: "I think it only reasonable to ask that if you offer Mrs. Stuart's guarantee you should furnish us with a statement of her means and ability to make it good."

Mr. Lee, on consideration, refused to throw good money after bad. Mr. Bruce seems to have dropped the notion of coming under any further obligation himself as soon as Mrs. Stuart was offered as surety in substitution for Mr. Lee. Then followed the most singular and perhaps the most important incident in the history of these transactions. It is detailed so fully in the correspondence which the bank has put in evidence that it is not necessary to give it in the form of a narrative or to add anything by way of comment. The correspondence consists of a letter from Mr. Bruce to Mr. Lee, which was shewn to Mr. Stuart, and a letter from Mr. Stuart to Mr. Bruce echoing and bettering the suggestions contained in that letter.

(*Mr. Bruce to Mr. Lee.*)

"10th February, 1896.

"My dear Mr. Lee,

"I have heard from Mr. Stuart something of his interview with you since his return from Chatham and as to the suggestion of new money being brought in by Mrs. Stuart in the hope that by that means the Maritime Sulphite Company may be enabled to establish the mill on a basis where it will be a paying concern. That would of course mean bringing in a larger sum than the $50,000 for which it was proposed a guarantee should be given to the Bank of Montreal.

"Now on general principles it did seem to me that in such a case as this if the existing shareholders are unable or unwilling

provide more money, they should be willing to contribute something to the person asked to bring in new money as an inducement to such person to do so, if they feel satisfied with (1) such new money is of a sufficient amount and given on such terms that they are likely to derive a benefit from its use in the business.

" The amount and terms in the present case are to be considered, and if deemed satisfactory it does seem to me that the shareholders can afford to give a portion of their preference stock, and that suggestion occurred to me and I mentioned it to Mr. Stuart saying that he should contribute as well as the others, and that Mr. Leys' estate and Mr. Brown should also contribute, as this would be expected to aid in relieving them from liability on the $175,000 debt, although they may not think they should contribute in like proportion to others.

" I promised Mr. Stuart to give you my views so that you may think the matter over and perhaps see what Mr. Leys' representatives think of the suggestion, and if you are up on Wednesday at the bank meeting the matter can be discussed.

" Truly yours,

" A. Bruce.

" A. B. Lee, Esq., Toronto."

(*Mr. Stuart to Mr. Bruce.*)

" The Maritime Sulphite Fibre Company (Limited),
Chatham, New Brunswick, Canada.

" Alex. Bruce, Esq., Q.C.
" City.

" Hamilton,
12th February, 1896.

" Dear Sir,

" I have to thank you for a reading of your letter to Mr. Lee and of his reply in reference to procuring the means required for providing working capital and new digesters and other things necessary to enable this company so to increase the output and reduce the cost of production as to give hope of returns from the business adequate to meet the interest on the capital invested. It is clear that without these things being accomplished, the

(1) *Sic.*

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property will be almost if not entirely lost. Mr. Lee and I have advanced the money to pay off the borrowings of the past, except that on the bonds now lying overdue in the Bank of Montreal, which may be said to be practically all the company's debt, except to us and the shareholders.

"Our advances amount in round numbers to $275,000, and I estimate that $100,000 more will be required—$25,000 being for the additional plant, and $75,000 for working capital. The bank appears to be willing to furnish the working capital—at all events to the extent of $50,000, but whether they will go beyond that, especially for the plant expenditure, I very much doubt.

"For the $50,000 they require a lien on the raw material and stock of fibre on hand, and the proceeds of sales, backed by an unconditional guarantee from Mr. Lee and myself. Mr. Lee objects to be involved personally to any greater extent than he now is, and we must get some one to take his place in the new guarantee, or suffer the entire loss of the share capital, as well as, most likely the greater part, if not all of the lent money. The question at once presents itself: What inducement can be offered to any one to assume the responsibility of guaranteeing the necessary advances, and how can the matter be arranged?

"There are three classes of shareholders interested. Mr. Richard Brown, the owner of 91 shares of the preference stock and guarantor for $15,900 of the money due to the Bank of Montreal against the bonds. The late Mr. John Leys' estate holding 182 shares of the preference and 50 shares of the common, with a liability to the bank for $31,800 of the bond advance. Mr. Alex. Bruce holding 151 preference and 132 common stock, with a liability for $26,500 to the bank. Mr. A. B. Lee holding 182 preference and 205 common, with a liability in the first place for $175,000 and interest on the bond note and cash advances to the amount of $125,000 in round numbers; and finally myself holding 394 shares of preference and 613 shares of common and cash advances of about $150,000.

"By an arrangement with Mr. Brown and the Leys' estate I undertook to indemnify them against their liability to contribute on the bond advance by the Bank of Montreal.

"There was a further liability of the Leys' estate to contribute

a proportion of the amount the company owed the Bank of Hamilton at Mr. Leys' death, but that has been paid out of the moneys advanced by me.

"I believe I can procure the guarantor required by the bank for the new advances on the security of a lien on material, &c., to the bank, and the postponement by Mr. Lee and myself of our cash advances, together with a reasonable bonus in the way of stock, which may, under existing circumstances, be considered of only nominal value.

"It is, of course, most vital to me to save this property in which my all is invested, and it is of no small consequence to all concerned, for all have not merely an interest in the value that is expected to be given to the stock, but also perhaps a more serious responsibility contingent on the unpaid debt to the Bank of Montreal.

"Mr. Lee suggests discussing the subject with you and all the others interested, but I would rather not myself now. If you will kindly confer with the parties I will be obliged. You have here, as well as in your own knowledge, all the information that seems necessary for you to come to a decision; and I would refer you also to my letter to Mr. Lee of the 5th instant.

"Yours truly,

"John Stuart."

Mr. Stuart's letter to Mr. Lee referred to in the above letters of the 5th and the 12th of February is not in evidence. On receipt of Mr. Stuart's letter to him of the 12th of February Mr. Bruce continued his negotiations with the other shareholders with the view of supplying a consideration as an "inducement" to be put before Mrs. Stuart to "induce" her to bring in "fresh money." On February 18, 1896, Mr. Stuart wrote to Mr. Macnider asking for a few days' more time to complete the proposed guarantee, saying, by way of explanation, "Mr. Bruce will tell you that he has been negotiating with the other stockholders as to the terms on which my wife will join me in the guarantee." For some reason or other Mr. Stuart did not contribute any shares himself. The other shareholders agreed to sign a contract prepared by Mr. Bruce by which they mutually undertook to transfer to Mrs. Stuart the shares set opposite their

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respective names, amounting in the aggregate to 134 preference shares and 100 ordinary shares, towards which Mr. Bruce contributed 34 preference shares. The intended transfer was expressed to be "in consideration of Mrs. Jane J. Stuart giving a guarantee to the Bank of Montreal for advances made and to be made to the said company to the extent of $100,000." The extension of the guarantee so as to cover past advances appears for the first time in this agreement. To Mr. Stuart of course the alteration was absolutely immaterial. He had nothing to lose. To Mrs. Stuart it was an important extension of liability, though in the actual guarantee liability was limited to past advances by the Chatham branch of the bank. To Mr. Bruce it was certainly not wholly immaterial. Mr. Bruce seems to have made the alteration in the interest of the bank and the shareholders in the company without even bringing it to the attention of Mr. Stuart. Asked whether in preparing the guarantee he was acting as solicitor for both the bank and Mr. Stuart, he replied: "Well I think I was acting as solicitor for the Bank of Montreal in drawing the guarantee and I don't think Mr. Stuart had any other independent advice. I think both parties were quite willing to take the guarantee as prepared by me."

It is admitted that Mr. Bruce had no communication of any sort with Mrs. Stuart until she appeared in his office with her husband and signed the guarantee which covered future advances and past advances from the Chatham agency. The advances through that agency at the close of 1895, after Mr. Lee had discharged the debt of $100,000, amounted to the sum of $11,100, and that sum remained due when the guarantee was signed.

In the meantime Mr. Stuart had written to Mr. Macnider in reply to his request for information as to Mrs. Stuart's means, stating that 'she owned bank and other stocks of the value of about $100,000, mortgages $70,000, and real estate from $50,000 to $70,000." He did not in his letter tell Mr. Macnider that that amount had been diminished by the $125,000 for which Mrs. Stuart had bound her separate estate by her note for $125,000 in favour of the Bank of Hamilton.

On receipt of Mr. Stuart's letter Mr. Macnider at once wrote

to Mr. Bruce, repeating the information Mr. Stuart had given to him about his wife's means, and adding: "I should like to have your professional opinion of her legal ability and right to bind all the estate by indorsement or guarantee and your opinion also as to its value and if unencumbered."

On February 21 Mr. Bruce sent Mr. Macnider his "opinion as to Mrs. Stuart's power of contracting and means." The bank represented by Mr. Bruce in this action claimed privilege for that document, and it has not been produced. Now the only person to whom Mr. Bruce could apply for information as to Mrs. Stuart's means was Mr. Stuart, and it was obviously Mr. Bruce's duty to make such an application. If Mr. Stuart disclosed the transaction with the Bank of Hamilton, the Bank of Montreal must have known that Mrs. Stuart had already parted with half her fortune. If he did not do so, he was acting unfairly both to the Bank of Montreal and to his wife.

On February 24, 1896, at Mr. Bruce's office, Mrs. Stuart executed the guarantee for $100,000 in favour of the bank. On the same day, and as parts of one and the same transaction, two other instruments were executed. One was the shareholders' agreement already mentioned for the transfer to Mrs. Stuart of certain shares in the company, which were at the time, as Mr. Stuart reminded Mr. Bruce, "of only nominal value." The other was an indenture made between Mr. Stuart of the first part, Mr. Lee of the second part, and Mrs. Stuart of the third part, whereby, after stating that Mr. Lee and Mr. Stuart had paid for the company the sums of $125,000 and $150,000 respectively (the same sums it will be observed as the "cash advances" mentioned in Mr. Stuart's letter of February 12), those advances were postponed to Mrs. Stuart's claims in respect of advances under her guarantee. In this deed it was among other things witnessed that "for the consideration aforesaid," that is in consideration of Mrs. Stuart giving her guarantee, Mr. Stuart agreed with Mrs. Stuart that if she paid any money for the company under her guarantee she should be paid by the company all sums so paid before Mr. Stuart received any part of "the company's said indebtedness to him." Now the company's indebtedness to Mr. Stuart and Mr. Stuart's so-called "cash

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advances" to the company included the $125,000 paid by him out of his wife's moneys. So that the postponement of Mrs. Stuart's advances through the Bank of Hamilton to her advances through the Bank of Montreal is actually treated as part of the consideration moving to her. It is impossible to suppose that when Mr. Bruce prepared this document and allowed Mr. Stuart to execute it and put it before Mrs. Stuart for her execution he could have been aware of the real transaction with the Bank of Hamilton.

The rest of the story may be told very shortly.

On July 14, 1896, Mr. Stuart procured his wife to assign to trustees for the bank mortgages for sums amounting to $27,000 or thereabouts to secure advances for the purchase of fixed machinery.

On April 11, 1898, Mr. Stuart procured his wife to sign another guarantee to the bank for $125,000 which included the former guarantee for $100,000. The giving of this guarantee was arranged at an interview between Mr. Macnider, Mr. Stuart, and Mr. Bruce, of which Mr. Macnider gives an account in a letter of April 1, 1898, to the manager at Chatham, saying, among other things, "Mrs. Stuart is to increase her guarantee to $125,000 to be prepared by Mr. Bruce."

In 1901 the company went into liquidation.

On October 2, 1903, Mrs. Stuart and her husband gave the bank a mortgage upon all her real estate.

The result of these transactions was that Mrs. Stuart surrendered to the bank all her estate, real and personal, including Inglewood, and was left without any means of her own. Mr. Stuart had nothing but a life annuity or retiring pension from the Bank of Hamilton, which the Bank of Montreal claims in the event of Mrs. Stuart succeeding on this appeal.

The evidence is clear that in all these transactions Mrs. Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own. Nor had she any means of forming an independent judgment even if she had desired to do so. She was ready to sign anything that her husband asked her to sign and do anything he told her to do. At the same time it is right to say that in her evidence in this action she repudiates the notion that any influence was exerted

or any pressure put upon her, or that her husband made any misrepresentation to her. She says she acted of her own free will to relieve her husband in his distress and that she would have scorned to consult any one. She certainly knew that she was incurring liability in order to help her husband and the company in which he was interested. Her declarations in the course of her cross-examination that she acted of her own free will and not under her husband's influence merely shew how deeprooted and how lasting the influence of her husband was.

Such being the facts of the case, can these transactions stand?

Their Lordships accept the law as laid down by Parker V.-C. in *Nedby* v. *Nedby* (1), to the effect that in the case of husband and wife the burden of proving undue influence lies upon those who allege it. It is difficult to determine in any case the point at which the influence of one mind upon another amounts to undue influence. It is specially so in the case of husband and wife, for, as Lord Cranworth observed, "The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish": *Boyse* v. *Rossborough*. (2)

It may well be argued that when there is evidence of overpowering influence and the transaction brought about is immoderate and irrational, as it was in the present case, proof of undue influence is complete. However that may be, it seems to their Lordships that in this case there is enough, according to the recognized doctrine of Courts of Equity, to entitle Mrs. Stuart to relief. Unfair advantage of Mrs. Stuart's confidence in her husband was taken by Mr. Stuart, and also it must be added by Mr. Bruce. Their Lordships do not attribute to Mr. Bruce intentional unfairness, but Mr. Bruce was in a position in which it would have been almost impossible for any man to act fairly. He was solicitor for the bank. He was the legal adviser of Mr. Stuart. He took upon himself to enter into negotiations with his fellow shareholders on behalf of Mrs. Stuart. Above all, he had, as the managers of the bank well knew, a strong personal

(1) 5 De G. & Sm. 377. (2) (1857) 6 H. L. C. 48.

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interest in procuring Mrs. Stuart to give the guarantee. He knew that all Mr. Stuart's means were embarked in the company, and no one knew better than he that unless some one came forward and guaranteed the bank in respect of further advances his own interest and the interest of his associates as shareholders were worth nothing, and his claim as a creditor in all probability equally valueless. He and his associates other than Mr. Stuart were unwilling to risk their own moneys. Mr. Stuart had no money to risk. The game Mr. Stuart was playing was desperate. It was the throw of a gambler with money not his own. No man in his senses with any regard to the interest of Mrs. Stuart or the interest of Mr. Stuart could have advised Mrs. Stuart to act as her husband told her to do. The bank left everything to Mr. Bruce and the bank must be answerable for what he did. Without communicating with Mrs. Stuart, Mr. Bruce of his own motion extended the guarantee to past advances from the Chatham branch. More than that, he took upon himself to act on behalf of Mrs. Stuart in procuring the transfer of shares to her by way of consideration for undertaking a risk which neither he nor any of his solvent associates were willing to accept. And the consideration, as he must have known if he had considered the matter, was absolutely illusory. It was worse than illusory, for it fixed Mrs. Stuart with a common interest in the fortunes of the company, and no doubt relieved her husband from any feeling of compunction in getting his wife to make so great a sacrifice for the benefit of the shareholders and afterwards dragging her deeper into the mire. Now it has been laid down in the House of Lords that the husband's solicitor owes a duty to the wife in transactions between the husband and wife where her interests are concerned. "I think," said Lord Davey in *Willis* v. *Barron* (1), "it is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is prima facie entitled to look to her husband's solicitor—the solicitor of her husband's family—for advice and assistance until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman."

That observation seems to apply with peculiar force to a case

(1) [1902] A. C. 283.

like this where the solicitor takes upon himself to intervene on behalf of the wife. Mr. Bruce undertook a duty towards Mrs. Stuart, but he left her in a worse position than she would have been if he had not interfered at all. His course was plain. He ought to have endeavoured to advise the wife and to place her position and the consequences of what she was doing fully and plainly before her. Probably if not certainly she would have rejected his intervention. And then he ought to have gone to the husband and insisted on the wife being separately advised, and if that was an impossibility owing to the implicit confidence which Mrs. Stuart reposed in her husband, he ought to have retired from the business altogether and told the bank why he did so.

Their Lordships are of opinion that the order of the Supreme Court of Canada is right, though they are unable to concur in the reasons on which that order is founded, and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Bischoff, Dodgson, Coxe, Bompas & Bischoff.*

Solicitors for plaintiff respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

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MUNRO AND OTHERS . . . . . PLAINTIFFS;

AND

DIDCOTT AND ANOTHER . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Natal Law 19 *of* 1884, *ss.* 2 *and* 3—*Mining Lease—Cession to Trustees by way of Mortgage—Registration.*

By a mining lease dated May 28, 1898, all the coal and ironstone mines within and under certain lands were demised and let for fifty years from May 1, 1898, at a specified rent. Liberty was given to the lessee as ancillary to working the mines to build on the said lands and to exercise very extensive rights over their surface, including rights of exclusive possession with a right of sub-letting the whole or any portion of the premises, and also at the end of each successive period of five years to surrender the lease on giving six months' notice.

By deeds of September 27, 1905, and January 12, 1906, the company which had succeeded to the lessee's title conveyed the leased premises to trustees, charging the same by way of first charge with the repayment of certain debentures in suit which it had created. The lease was ceded and delivered to the trustees in the manner required to effect a mortgage by pledge or deposit; but neither the lease nor its transfer to the company nor either of the said deeds was registered in Natal:—

Held, that in order to create a good and valid security so as to give the debenture-holders priority over unsecured creditors of the company there must be a registered mortgage of an already registered lease. The lease in question, though a mining lease, was a lease within the meaning of ss. 2 and 3 of Natal Law 19 of 1884, and therefore required registration in the Deeds Registry. If, on the other hand, the transaction was regarded as a purchase of a portion of the soil, by the common law of Natal it could only be effectually mortgaged by a registered instrument.

APPEAL from a judgment of the Supreme Court of Natal (May 5, 1908).

The question decided was whether the plaintiffs Munro and Bovill as trustees for the debenture-holders of the Newcastle (Natal) Steam Coal Collieries, Limited, and Parker as receiver thereof for the debenture-holders are entitled to any valid

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD MERSEY, and LORD ROBSON.

pledge, mortgage, or lien enforceable under the law of the Colony of Natal or to any preference over the unsecured creditors of the company under a mining lease dated May 28, 1898, and the ultimate cession thereof to Munro and Bovill as such trustees.

On March 6, 1907, an action was brought in the Supreme Court under the circumstances detailed in the judgment of their Lordships by the trustees and certain debenture-holders against the said company to have the securities created by the trust deed enforced, and for a declaration that the debentures secured by the trust deed and cession constituted a first charge on all the property comprised in the same. The order of May 5, 1908, was to the effect that, having regard to the nature and provisions of the lease and the non-registration of its cession, the trust deed, and the debentures, no valid charge had been created on the property comprised in the lease which entitled the plaintiffs to a decree. The lease was held to be not a lease at common law, but a mineral lease within the provisions of Natal Laws 17 of 1887 and 34 of 1888. The Court held that under Law 19 of 1884 a mortgage of a mineral lease in order to create a preference must be registered in Natal. If a lease it was a lease in longum tempus and could only be effectually mortgaged by an instrument so registered; and even if the rights granted by the lease were incorporeal the same result followed.

Buckmaster, *K.C.*, and *Mulligan*, for the appellants, contended that the Supreme Court was right in holding that the indenture of May 28, 1898, was not a lease at common law. The transaction was under Law 17 of 1887, s. 30, by which the Crown granted to the owner of land the right to grant to one or more persons the privilege to dig for coal. It was a licence rather than a lease which was so authorized, and it was erroneously labelled by the grantor a mining or mineral lease. No special form of assignment of this privilege was prescribed by law. Nor did the law which created this special mining right require that any transfer, cession, or hypothecation thereof should be registered. Mining rights registers were no doubt authorized to be established by the Governor in Council, but no such registers had ever been created and none are in existence. There was no

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provision by law that in the absence of such registers any rights held under "mineral leases" shall depend for their validity upon registration. The Natal Ordinance No. 2 of 1846, which created a deeds office, does not provide that the registrar can be required or authorized to register a "mineral lease" unknown at the date of the Ordinance and created by a subsequent statute, or a cession thereof. It was contended that Law 19 of 1884 applied only to leases at common law and not to mining leases such as that in question, which were unknown when that law was passed. This lease embodies a grant of incorporeal rights, and the cession thereof to the trustees was completed by its delivery to their agents, and the same constituted a valid pledge at common law without registration. Reference was made to *Easterbrook's Trustees* v. *McNeil* (1); *Neebe* v. *Registrar of Mining Rights* (2); *South Africa Loan Mortgage and Mercantile Agency* v. *Cape of Good Hope Bank* (3); *In re Fourie* (4); Maasdorp's Institutes of Cape Law, vol. 2, p. 240; Nathan's Common Law of South Africa, vol. 2, s. 899; *Houtpoort Mining and Estate Syndicate, Ld.* v. *Jacobs* (5); and *In re Crozier.* (6)

P. Ogden Lawrence, K.C., and *Owen Thompson*, for the respondents, the official managers of the Newcastle Company in liquidation, contended that the judgment of the Supreme Court should be affirmed. The debenture-holders had no valid pledge, mortgage, or lien enforceable under the laws of the Colony of Natal in respect of the lease of May 28, 1898. That lease was a lease within the meaning of Law 19 of 1884, ss. 2 and 3 of which were applicable to the transaction in suit. Registration of the cession thereof on January 12, 1906, was essential to the creation of a valid mortgage, and in its absence the cession created no preference or security in favour of the trustees of the trust deed of September 27, 1905. By the law of Natal the lease must be deemed to be a lease in longum tempus; and if that were not so it creates an interest in land, and in either view registration of the cession thereof was necessary. In another view the lease might be regarded as creating an interest

(1) (1883) 4 Natal L. R. 119.
(2) (1902) Trans. L. R. (S. C.) 65.
(3) (1888) 6 Juta, 163, 180.
(4) (1906) 27 Natal L. R. 342.
(5) (1904) Trans. L. R. (S. C.) 105.
(6) (1893) 14 Natal L. R. 125.

in the nature of movable property. In that case no effective mortgage, lien, or pledge of such interest could be created save by a registered notarial bond or by delivery of the lease to the trustees, and the appellants have not proved that either of those expedients was adopted.

Mulligan in reply.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Supreme Court of Natal, dated May 5, 1908.

The facts, so far as they are directly relevant, in the events which have happened, to the sole question for decision, are as follows.

By an indenture bearing date May 16, 1892, one Nicholas Johannes Degenaar, therein described, "demised and let" to one Richard Augustine Studdert Redmayne, therein also described, "all the coal and ironstone mines within under upon or in any way appertaining to that piece of land situate in the division of Newcastle in the Colony of Natal, called Ballangeich, in extent four thousand and five acres, for the term of six years, commencing on the 1st day of May, 1892, and ending on the 30th day of April, 1898."

This lease contained a clause entitling the lessee at any time before its termination to require the lessor to renew the lease for a period of fifty years from April 30, 1898.

All the interest of the lessee became before March 21, 1898, vested in one Edward Walmsley, who upon that date served notice upon the lessor requiring him to grant a renewal of the lease.

By indenture dated May 28, 1898, made between the original lessor and the said Walmsley, reciting the first-mentioned lease and the covenant for renewal which it contained, "it was covenanted and agreed" by and between the lessor and the lessee that the lessor had let to the lessee (i.e., Walmsley) and the lessee had hired from the lessor all the coal and ironstone mines whether under, upon, or in any way appertaining to the said piece of land called Ballangeich in the division of Newcastle in the Colony of Natal, bounded as therein described, on the terms therein

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mentioned, of which it is only necessary to mention the following. The term was to be fifty years from May 1, 1898, and the rent 400*l.* per annum. The lessee was given "power and authority to enter upon the said land called Ballangeich to work win get carry away and dispose of all the coal and ironstone in, under, or upon said land contained and for the said purposes to sink maintain erect and use any pits adits engines engine-houses machinery buildings coke ovens iron furnaces iron works roads bridges railways tramways reservoirs dams and watercourses and to store deposit bank make into coke burn smelt convert and manufacture the produce of the mines hereby leased and to construct erect maintain and use all further and other works whether underground or on the surface of said land and to do and perform every other act, matter, and thing usual or necessary in the premises."

Liberty was also given to the lessee to erect on these lands of Ballangeich houses and other buildings of any description for the accommodation of his servants and the carrying on of his works and operations; to fence off and occupy such portion or portions of these lands not exceeding in all fifty acres as he might require for the purpose of banking or storing coal or other minerals, carrying on his works and operations, or as gardens for his servants, and to depasture and graze on the entire lands any horses, oxen, or other stock employed by him in the carrying on his works and operations. It will thus be seen that the lessor conferred upon the lessee very extensive rights over the surface of the land, including the right to the exclusive possession and enjoyment of some portions of it; though no doubt these rights were ancillary only to the main purpose—the working of the mines. In addition to these, by clause 16 of this instrument, there was conferred upon the lessee the right to sub-let to any persons or company for such rent and royalties, and upon such terms as to him might seem fit, "the whole or any portion of the premises" thereby "let" without prejudice to the lessor's right to the payment of the rent of 400*l.* per annum and the performance by the lessee of the covenant and conditions. The lessee was further entitled to surrender the lease at the end of each successive period of five years

on giving six months' notice. This lease was throughout the proceedings styled a "mining lease."

The lessee's interests under it were ultimately, by deed dated April 9, 1903, ceded or conveyed to the Newcastle (Natal) Steam Coal Collieries, Limited, a joint stock company duly registered in England which had been formed to work these mines. Neither the indenture of May 28, 1898, nor this conveyance to the company was ever registered in Natal. The company, on September 26, 1905, duly resolved to create and issue 150 first mortgage debentures of 100*l.* each at the price of 50*l.*, bearing interest at 6 per cent. per annum. By a trust deed dated September 27, 1905, made between the company and John Munro and Edward Merewether Bovill (two of the appellants), called "the trustees," the company, as beneficial owners of the premises let by the indenture of May 28, 1898, demised the same to these trustees for all the residue of the said term of fifty years then unexpired, less the last three days thereof, to secure, with the other assets of the company, the principal money and interest due or to become due upon these 100*l.* debentures.

By deed bearing date January 12, 1906, the company ceded or conveyed or assigned to the trustees all the lessee's interest under the said mining lease in trust to secure the payment to the debenture-holders of all sums due or to become due to them upon the 100*l.* debentures. Neither this deed nor the trust deed of September 27, 1905, was ever registered in Natal. In the interval between the date of these two instruments 100 of the said debentures were issued, 60 to John William Taylor and Edward Merewether Bovill, one of the appellants, and the remaining 40 to others. The Registrar of Joint Stock Companies in England duly granted his certificates of the registration of the trust deed and of the debentures.

On October 19, 1905, the solicitors and agents for the company handed over to the solicitors for the trustees the indenture of May 28, 1898, together with the several conveyances, assignments, or instruments of cession, as they are styled, by which the interest of the lessee under the lease first mentioned became vested in the company.

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Their Lordships gave leave to the appellant to use on the hearing of this appeal evidence not before the Supreme Court of Natal. Mr. Lawrence, on behalf of the respondents, having examined the evidence, frankly admitted that delivery of the mining lease of May 28, 1898, to the solicitors of the trustees took place in such a manner and under such conditions that a mortgage by pledge of the lessee's interest would thereby have been created, if under the statute and common law of Natal it would have been possible under the circumstances of the case to have incumbered that interest by such a method. He contended, however, first, that the indenture of May 28, 1898, though a mining lease, was still a lease within the meaning of Law 19, 1884, of Natal; that the case was governed by the provisions of ss. 2 and 3 of that statute, and that therefore no mortgage could be created by pledge in the manner contended for by the appellants, which would give to the equitable mortgagee priority over the unsecured creditors of the mortgagor; and, secondly, that, even if this instrument were not a lease within the meaning of this statute, it granted, conveyed, or ceded to the so-called lessee an estate or interest in land of such a nature that in the absence of registration no equitable mortgage of the kind contended for could, under the common law of Natal, be created by a pledge or deposit such as that alleged to have taken place. The appellants, on the other hand, contended that the indenture of May 28, 1898, was not a lease within the meaning of this statute, though it might be a lease within the meaning of several statutes dealing with mines and mining rights passed some years later, and that therefore a good and valid equitable mortgage had been created by deposit which gave the mortgagees priority over the unsecured creditors of the mortgagor.

These are the only questions calling for decision on this appeal. They emerge from litigation instituted both in England and Natal dealing with the affairs of this company. It is unnecessary to enter at any length into the details of the litigation or of the transactions which took place subsequent to January 12, 1906. It will suffice to mention the matters following.

A debenture-holder's action was instituted in England against

the company, and Alexander George Parker, one of the appellants, was on January 13, 1906, appointed receiver over the undertaking of the company. On January 23, 1906, resolutions were passed by the company that it should be wound up voluntarily, and the same Alexander George Parker was appointed liquidator. On June 6, 1906, it was ordered by the Supreme Court of Natal that the company should be wound up for the benefit of its creditors, and by a further order of the same Court, dated January 15, 1907, the respondents were appointed official managers of the company, an office presumably resembling that of official liquidators in this country. This so-called mineral lease and plant, part of the assets of the company, were, with the concurrence of Parker, sold by the official managers under the direction of the Supreme Court for a sum of 15,500*l.* By order of that Court, dated February 21, 1907, it was amongst other things directed that the sum of 10,500*l.*, portion of the 15,500*l.*, should be retained by the Master of the Court, that the balance should be paid to the present respondents, and that proceedings should be forthwith commenced by the present appellants for a declaration of the rights of the parties.

In obedience to this order the action out of which this appeal arises was brought to try the question whether the trustees as equitable mortgagees are entitled to be paid the sum so retained in trust for the debenture-holders in priority to the unsecured creditors of the company, or are only entitled to rank as unsecured creditors on the ground that their equitable mortgage is void. This was the question in controversy in the suit, and this again turns on the questions already indicated.

By the 11th section of the Act 19, 1884, of Natal, it is enacted that the word mortgage shall, unless the context otherwise requires, include "any pledge or hypothec or charge or deposit or mortgage bond."

Sect. 2 enacts that "any lease" shall be capable of registration in the circumstances therein detailed, and then proceeds to provide "that if any lease be derived or carved from out of any other lease to be made after this law shall have come into operation, such derived lease shall not be capable of

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registration unless and until such other lease shall have been registered."

It is not disputed that the interest in the lands and mines conveyed or ceded to or vested in the trustees by the trust deed of September 27, 1905, was derived or carved from out of the interest of the lessee under the indenture of May 28, 1898.

Sect. 3 of the same statute provided that any mortgage of any lease not then registered to be made after the Act came into operation should only have the effect of a general mortgage, which means that as between mortgagor and mortgagee it should not be void, but should not give to the mortgagee any priority over the unsecured creditors of the mortgagor.

Some question was raised as to the meaning of the word "then" as used in this section. Their Lordships are clearly of opinion that it means not registered at the time the mortgage was made.

And the 4th section enacts that any mortgage of any title deed of a lease shall have no greater effect than if the interest in the lessee were freehold in nature.

Lord Cairns, in dealing, in *Gowan* v. *Christie* (1), with a mining lease very similar in its terms to the lease of May 28, 1898, is reported to have expressed himself thus: "I should doubt extremely whether dicta of this kind apply at all to leases of mineral subjects; for although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil."

This no doubt may be in reality the true nature of the transaction embodied in the instrument of May 28, 1898; but Mr. Lawrence contends that whichever of the two constructions of that document be adopted, the appellants must fail,

(1) (1873) L R. 2 Sc. App. 273, at p. 283.

inasmuch as, if it amounts to, in reality, a purchase of portion of the soil, as Lord Cairns suggests, the lessee must be seised or possessed of an interest in land; and an interest in land, other than a leasehold interest, can by the common law of Natal only be effectually mortgaged by an instrument registered in the Registry of Deeds. The case of *Re Anderson and Greig* (1), cited by the Chief Justice in his judgment, decided that the interest of the lessee under such a mining lease as this is an interest in land; so that the appellant must fail unless the rights created by this lease are merely incorporeal rights. The authorities cited by the learned Chief Justice go far to shew that such rights are not merely incorporeal; and certainly if they be not, and indeed to some extent even if they be, it does not appear to their Lordships that there is anything in the nature of the thing itself to shew why provisions such as those contained in the statute should not apply to a lease such as the present quite as reasonably as to an agricultural lease or a lease of a house.

The objects of all registration are, among other things, to afford to the public the means of knowing to whom the ownership of the land of a country belongs, what are the interests carved out of it, and what are the charges upon and incumbrances affecting it, so that these owners may discharge the liabilities ownership entails, that those who deal with them may be protected, and, in many cases, that the transfer to others of their proprietary interests may be easily and inexpensively effected. All these considerations apply as directly and as forcibly to mining leases as to leases of the surface above the mines, and there does not, therefore, seem to be any reason why the Legislature should necessarily exclude mining leases from the operation of this statute. The words used are general, "any lease." It is, in their Lordships' opinion, clear that the indenture of May 28, 1898, must either be a lease or a deed of purchase and sale of portion of these lands, and that the rights it confers are not merely incorporeal rights. If it be a lease at all, it is not disputed that it must be a lease in "longum tempus." In either of the first two events the appellants must fail, since the mortgage was not, indeed could not, be registered.

(1) (1907) 6 Natal Law Quarterly, 83; S. C. 28 Natal L. R. 185.

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The Chief Justice and Beaumont J. in their elaborate judgments have examined all the authorities. They have come to the conclusion that they were justified in holding that this mining lease of May 28, 1898, was a lease within the meaning of this Natal Statute 19 of 1884. Their Lordships see no reason to disagree with that conclusion. On the contrary, they think that on the whole it is right, and are therefore of opinion that the appeal should be dismissed. They will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Ernest Salaman & Co.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[HOUSE OF LORDS.]

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SMITH (SURVEYOR OF TAXES) . . . . APPELLANT;

AND

LION BREWERY COMPANY, LIMITED . RESPONDENTS.

Revenue—Income Tax—Deductions—Profits of Brewery—Tied Licensed Houses—Compensation Levy—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Income Tax Act*, 1842 (5 *& 6 Vict. c.* 35), *s.* 100, *Cases* 1 *and* 2, *r.* 1; *Sched. D.*

A brewery company as an essential part of their business acquired and held licensed houses which they let to tenants who covenanted to buy all their beer from the company. The sole purpose of the company in thus acting was to increase the profits of their trade in manufacturing and selling beer wholesale. If any house lost its licence the company got rid of that house as soon as possible. The annual compensation levy imposed by the Licensing Act, 1904, s. 3, was paid as to the company's share of the levy by the tenant paying that share and deducting it from his rent as provided by the Act.

In estimating for income tax purposes the yearly profits of their trade—which were increased by their ownership of the houses—the company claimed to make a deduction in respect of the sum which they were compelled to pay for the levy, and contended that the sum was "wholly and exclusively laid out or expended for the purposes of their

trade" within the meaning of the Income Tax Act, 1842, s. 100, cases 1 and 2, r. 1; Sched. D:—

Held by the Earl of Halsbury and Lord Atkinson (Lord Loreburn L.C. and Lord Shaw of Dunfermline dissenting), that upon the facts as stated by the Income Tax Commissioners a deduction was allowed by the Income Tax Act, 1842.

The House being equally divided, the decision of the Court of Appeal, [1909] 2 K. B. 912, was affirmed.

THE facts relative to this appeal are set forth in the judgments in this House. The compensation charges which were deducted from the rents of the tied houses owned by the brewery company amounted in the year 1905 to 3600*l*. Of this sum the Income Tax Commissioners held that the brewery company in estimating their profits for assessment to the income tax were entitled to deduct one third (1200*l*.). Channell J. held (1) that the brewery company were not so entitled, as the money was not "wholly and exclusively laid out or expended for the purposes of" the brewery company's "trade." This decision was reversed by the Court of Appeal (Cozens-Hardy M.R. and Farwell L.J., Kennedy L.J. dissenting). Hence this appeal.

1910. Nov. 7, 8. *Sir Rufus Isaacs*, *A.-G.*, and *Rowlatt* (*W. Finlay* with them), for the appellant. By the Income Tax Act, 1842, s. 100, cases 1 and 2, r. 1; Sched. D, in estimating the balance of profits or gains of a trade no sum can be deducted "for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade." The question here is whether the contribution by the brewery company to the compensation levy under the Licensing Act, 1904, s. 3, was wholly and exclusively laid out or expended for the purposes of the respondents' brewery trade. The contribution to the compensation levy is imposed upon the owner of a licensed house in respect of that house, and not upon him as a brewer in respect of his brewery or any other trade. The object of the levy is to provide an insurance fund for compensating the tenant and the owner of a licensed house where for no fault of theirs the licence is not renewed. The owner contributes to the fund and shares in the compensation. The

(1) [1909] 1 K. B. 711.

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amount of the owner's contribution depends upon the value of the house, and not upon the profits of the brewery or any other trade the owner carries on. The ownership of licensed houses is not a part of the respondents' brewery trade and is not in itself a trade. The retail trade carried on by the tenant of a licensed house is not confined to beer ; it may include wine and spirits with which the brewery trade is not concerned. The amount of the respondents' contribution was therefore not wholly and exclusively laid out for the purposes of the brewery. The owner of a licensed house pays income tax for it under Sched. A, not under Sched. D, and cannot claim a deduction under Sched. D in respect of that house.

None of the decided cases are direct authorities in respect of the question raised here, but the reasoning of *Watney & Co.* v. *Musgrave* (1), *Brickwood & Co.* v. *Reynolds* (2), and *Strong & Co.* v. *Woodifield* (3) is in favour of the appellant.

Sir Robert Finlay, K.C., and *Bodkin*, for the respondents. It is found as a fact in the case stated by the Commissioners of Income Tax that the respondents are, as part of their business as brewers and as a necessary incident of the profitable exploitation thereof, owners and landlords of licensed houses acquired and held by them in the course of and solely for the purposes of their business whereby they earn profits which they could not earn without the houses. This finding brings the case within the deductions allowed by the Income Tax Act, 1842. The ownership having been acquired and held wholly and exclusively for the purposes of the trade, it follows that the contribution to the compensation levy was money wholly and exclusively laid out or expended for the purposes of the trade, namely, the earning of profits. It was not an optional expense such as an insurance: it was a statutory and compulsory requisition. What becomes of the contribution after it is paid has no bearing on the question. It matters nothing to the brewery to what purposes the contribution is applied, whether for a retail business of wine, spirits, or beer. The retail trader can deduct a necessary expense in estimating his profits: why cannot a wholesale trader make a

(1) (1880) 5 Ex. D. 241, 245. (2) [1898] 1 Q. B. 95, 102.
(3) [1906] A. C. 448, 452.

similar deduction? The principle of deduction is clearly explained in *Gresham Life Assurance Society* v. *Styles* (1) by Lord Herschell.

Sir Rufus Isaacs, A.-G., in reply.

The House took time for consideration.

1911. Feb. 14. LORD LOREBURN L.C. My Lords, I consider that this order ought to be reversed. The point arising for decision is short. The Lion Brewery Company have for income tax purposes to ascertain the balance of the gains and profits of their trade. In so doing they claim to deduct the amount which they are obliged to pay as owners of tied houses in respect of the compensation levy authorized by the Licensing Act of 1904. May they make this deduction or not? That is the sole point.

Now the Income Tax Act, 1842, s. 100, tells us under what circumstances a deduction of this kind can be made. It can be made if the money was "wholly and exclusively laid out or expended for the purposes of such" (that is the brewery company's) "trade, manufacture, adventure or concern."

The Lion Brewery Company's trade is that of manufacturing and selling beer wholesale. The brewery company owned a number of tied houses, and owning such houses is found to be a necessary incident of their trade and increases their profits, and this was the only reason for which they acquired or retained these tied houses. It must be taken that the motive of the brewery company in owning tied houses was simply and solely to obtain a reliable market for their beer, and this is the utmost which can be conveyed in the somewhat redundant findings of the special case. The company owned the tied houses for that reason and it was essential to their trade to own them.

The Act of 1904 compels a licence holder to pay a levy. That levy is to form a fund, out of which compensation is to be made to those whose licences are discontinued by no fault of their own but in order to carry out the statutory policy of reducing the number of licensed houses, and also to those who own the houses themselves. They are entitled to share in the

(1) [1892] A. C. 309, 323.

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compensation and are also bound to contribute to the fund. The licence holder can deduct a part of it from the rent he pays, and his landlord may in turn deduct from the rent he has to pay, and so on, in order that each person interested in the house may contribute to the fund in proportion to the extent of his interest, in accordance with the tables set forth in Scheds. I. and II.

When a public-house is deprived of its licence under the Act of 1904 a trade is destroyed. It is the retail trade which is destroyed, comprising the sale of wines and spirits as well as the sale of beer. That is the loss which is to be compensated, and the owner of the house shares in the compensation, because a house with a licence is more valuable than a house without a licence. He is compensated simply for the diminution in the value of the house itself by reason of the discontinuance of the licence to sell beer, spirits, and wine therein.

Suppose that the owner of the house is not a brewer, but a man who has no trade at all. He will have to bear his share of the levy, as he would receive his share of the compensation. It was not argued that he can make a deduction from income tax under Sched. A, and as to Sched. D he can make no deduction because he carries on no trade, and he is not, therefore, accountable at all under that schedule.

But it is said that the owner of the house, if he is also a brewer, is accountable under Sched. D in respect of his trade and can therefore make the deduction from the profits of his brewery trade under that schedule. In my opinion he cannot, and for two reasons.

In the first place the trade from the profits of which he seeks to make the deduction is the wholesale trade of manufacturing and selling beer alone. The levy, so far as it is laid out or expended for the purpose of any trade, is laid out or expended for the purpose of insuring against loss by destruction of the retail trade authorized by the licence, which is that of selling wine and spirits and not beer alone. I confess that I cannot see how the levy can be said to be "wholly and exclusively laid out or expended for the purposes of the trade" of the Lion Brewery Company, which has nothing to do with wine and spirits. It is proportioned to

the annual value of the licensed premises, is paid out of the profits of the retail licensed trade or out of the rent of the licensed premises, and provides a fund to compensate those interested in licensed premises for their loss by reason of the retail trade being destroyed.

In the second place it is only in the character of owners of a house that the Lion Brewery Company can be called upon to pay this levy at all. The share of the levy which they have to pay is proportioned to the interest they have in the house, and has no relation to their wholesale trade of manufacturing and selling beer. They pay income tax for the house under Sched. A, not under Sched. D, and I cannot perceive how they can claim a deduction in the terms of Sched. D in respect of a property which is assessed under a wholly different schedule. You cannot, by saying that a man carries on the business of owning house property, shift the method of assessing that property for income tax from Sched. A to Sched. D, and still less, in my opinion, can you claim to take credit, by way of deduction, from an assessment upon a trade, for moneys paid in respect of ownership of landed property which is assessable under a different schedule altogether.

I agree with Kennedy L.J. that the levy is in substance a premium, which those interested in a licence, whether as landlords or as holders of the licence and tenants, pay to secure themselves against the loss which they might suffer by the retail trade under the licence being destroyed under the Act. "The rents of the tied houses do not form part of the trade profits of the Lion Brewery Company, and it is the rent receipts which are diminished by the tenants' deductions under the Licensing Act, 1904, s. 3." (1)

I do not think the dicta cited by members of the Court of Appeal are really relevant in this case. They are to be understood secundum subjectam materiam. We are here only concerned with the construction of an Act of Parliament.

EARL OF HALSBURY. My Lords, I regret I am unable to agree with the Lord Chancellor, and therefore what I say I must say

(1) Per Kennedy L.J., [1909] 2 K. B. at p. 927.

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with a certain amount of hesitation, from the respect which I hold for his opinion.

I think the judgment about to be delivered by my noble and learned friend beside me (Lord Atkinson) is that with which I should agree if for reasons I am about to give we were at liberty to inquire into the actual formation of the profits to be assessed. If indeed a determination of the particular case in hand were the only question which was demanded, I should say no more and content myself with Lord Atkinson's opinion, but I am of opinion that there is something much more important involved in the question, namely, whether or not we are entitled to go outside what has already been found. The facts are ascertained for us. There is no doubt that from time to time in ascertaining what is the taxable amount it might be an extremely difficult problem; but these facts have been ascertained for us and so ascertained that I do not think it is competent for us to go out of what has already been determined by the tribunal which the Legislature has considered sufficient to determine the form in which such a question if it arises should be determined.

The Master of the Rolls and Farwell L.J. quote, as I think they are entitled to do, the language of the case upon which we are now called to decide as decisive of the question, and there it is found that "the Lion Brewery Company are as part of their business and as a necessary incident of the profitable exploitation of such business the owners of" these premises which "have been acquired" by them "in the course of and solely for the purposes of their said business." My Lords, I have only to observe upon that that the persons who had to find these facts have as a matter of fact almost used the words of the Act of Parliament to shew what is or what is not the subject of taxation. It is true that Kennedy L.J., while he says that he is bound to accept the facts as found in certain paragraphs of the case, goes on to say that such expressions as are there used are metaphorical. But to my mind the language of the Lord Justice himself is open to criticism. I can find no metaphor at all, but a plain business statement of the facts which bring the case within the Act of Parliament.

I do not think that one gets much further if one looks at the rule which is relied upon as prohibiting certain deductions. Rule 1 says, "In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains" (now let it be observed what sort of things are prohibited as deductions) "for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade," &c. I pause there for a moment to point out that in the case stated to us the subject-matter, the ownership of the licensed houses, is found to have been acquired and held solely for the purposes of their said business.

One other observation I have to make, namely, as to the purpose for which this tax has been enacted. Whatever that purpose may be it is utterly immaterial. I notice (and it is curious enough that it is observed by the Lord Justice who objects to metaphors) that it is said to be like an insurance. I am not aware that, if it were, that would be a close analogy, because this is a tax which must be paid whether the owner of the licence likes it or not. I can imagine a person saying "Well, I will take my chance, I do not want to join this insurance; it is a question for me; I will do what I will with what is mine own." He must if he carries on that business or that trade pay this tax; it is the act of the Legislature which makes him pay it, and it is not a thing that is open to his own will or option.

Under these circumstances it appears to me that it would land us in a very serious difficulty if in any question like this we were called upon ourselves to do that which is the action of a business man, to find out what exactly he may or may not treat as part of the adventure, part of that which is necessary to be carried on. As to that matter—we being by the Act of Parliament confined to expressing our view whether by law such and such a deduction could possibly be made—I am of opinion that that is beyond us and has been decided for us by a competent tribunal. I decline, therefore, to enter into that question.

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LORD ATKINSON. My Lords, I share the regret expressed by Lord Halsbury that I am unable to concur in the judgment of the Lord Chancellor and have, of course, by reason of that circumstance all the less confidence in my own opinion.

The sole question for decision in this appeal is whether the brewery company, who are owners or lessees of certain premises licensed for the sale of intoxicating liquors, and let by them to certain publicans who are bound by covenant to buy and sell upon the premises demised the beer manufactured by the respondents and none other, are entitled, under the circumstances of this case, in ascertaining the balance of the gains and profits of their brewery trade assessable under the Income Tax Acts, to deduct, under s. 100, Sched. D, first and second cases, r. 1, the amount of the charge payable by them in respect of the compensation levy imposed by the Licensing Act of 1904. And this again turns upon the point whether the money disbursed in payment of this charge is or is not money, in the words of r. 1, "wholly and exclusively laid out or expended for the purposes of their" (the respondents') "trade, manufacture, or concern." I used the words "under the circumstances of this case" advisedly, for, in my view, the findings of fact set out in the case stated are matters vital for consideration, if not conclusive, on the question raised for decision. Those findings so far as material are in effect as follows: (1.) The system of selling the respondents' beer through the instrumentality of licensed houses tied to their brewery by covenant, in the manner described, is found to be a necessary incident to the profitable conduct by them of their trade as brewers; that is, of their trade as manufacturers and vendors of beer. (2.) That the respondents, by means of the system of trading so adopted by them, realize profits much in excess of what they would realize if they did not adopt it. (3.) That the possession and employment of these licensed premises as tied houses are essentially necessary for the realization of the enhanced profits on which the company pay income tax. (4.) That the respondents acquired the possession and enjoyment of these licensed premises solely for the purpose of employing them as tied houses in the manner described. (5.) That the company would not have acquired them as an

investment, and would not acquire or possess them at all, if they could not have used them as tied houses, or, in other words, they acquired and let these licensed premises solely for the purpose of securing by and through the tied-house system an exclusive market for their beer.

Under these circumstances it would appear to me impossible to contend, at least successfully, that these licensed premises were not acquired and let under the terms of these leases solely, wholly, and exclusively for the purposes of the trade of the respondents as manufacturers and vendors of beer. They acquired the houses in order that they might let them to persons who must needs buy beer, and they bind those persons to buy from them the beer needed.

Now what is the nature of the levy for compensation under the Licensing Act of 1904? First it is a compulsory levy. Though paid in the first instance in full by the publican in possession, it is, in the ultimate result, paid in part by him, and in part by every person having an interest in the premises. No doubt it is paid by those persons interested simply because they have the particular interest, irrespective of who or what they are, or what their position or avocation in life may be; but a portion of the contribution levy is by the Legislature imposed and charged upon every interest in the premises, which portion the owner of that interest must pay. And it certainly would appear to me that where a trader deliberately acquires any particular interest in the licensed premises wholly and exclusively for the purpose of using that interest to secure a market for the commodities he manufactures, the money he must expend to satisfy the charge thus imposed is necessarily disbursed wholly and exclusively for the purposes of this his trade.

In the present case the respondents cannot set up the system of trading through tied houses unless they first acquire these premises as owners in fee or lessees, and, secondly, unless the houses are licensed; but the moment these two conditions are fulfilled the liability to pay the compensation attaches. The impost must, therefore, necessarily be paid, in order to set up the system which it is found to be vital to their trade prospects to set up. And if the substance of the transaction be looked at,

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this impost differs, in my view, but little, if at all, from the licence or tax which a man is obliged to pay in order to carry on a particular trade or business such as that of an auctioneer, or a pawnbroker, or a publican.

It is an expenditure which must be incurred in order to earn the receipts which, after the due deductions have been made, form the balance of the gains and profits assessable to the income tax, and may, therefore, according to the decision of your Lordships' House, be properly deducted from those receipts.

Now it is objected in the first place that the landlord's share of the contribution is deducted from his rent by the tenant, who, in the first instance, pays the entire contribution. That is, obviously, mere machinery, a mere set-off of debts. The tenant pays himself out of his rent that portion of the contribution which must be ultimately borne by the landlord. It is therefore quite obvious that this arrangement cannot affect the question.

Again, it is urged that the landlord pays his contribution as landlord and because of his proprietary interest in the premises, and not as trader, since he would be equally liable to it whether he traded or not. That, no doubt, is so; but in the present case the company have become landlords, and thus become liable to pay the charge, for the purpose solely and exclusively of setting up the tied-house system of trading. If the company took under lease a plot of land to enlarge their brewery or took similarly premises in which to establish a depot to sell their beer through an agent, the same criticism might be applied with equal force to the payment of the rent reserved by the lease. They would pay it as lessees, not as brewers. They would pay it whether they continued to brew or not. Yet under the provisions of the very rule relied upon in this case, they would be entitled to deduct the rent from the profits earned, and that, too, utterly irrespective of whether the receiver of the rent used it to pay for his support or for his pleasure, or even to set up a rival brewery.

Indeed, even in a contract made for the purchase of material such as hops or malt, the company would have to pay for the commodity supplied, not because they are brewers, but because

they were contracting parties, utterly irrespective of whether they carried on their trade or had abandoned it. Yet it can hardly be suggested that the price paid for the hops or malt under the contract should not be deducted from the receipts. There is, therefore, in my opinion, nothing in this objection. Next it was urged that regard must be had to the purpose to which the contribution was devoted.

I think Sir Robert Finlay's contention that this is an altogether irrelevant matter is well founded. Were it not, it should be held that the licence duty paid by a publican, or a pawnbroker, or an auctioneer, to entitle him to carry on his trade or business is paid, not wholly or exclusively, or indeed at all, for the purposes of the trade or business carried on by him who paid it, but for the purpose to which it is appropriated by the Legislature, if it be specifically appropriated, or if not specifically appropriated, then paid in part, to each and every one of the special services to which the general taxation of the country is applied, such as the support of the Army, Navy, Civil Service, or education. Yet such duties as these can, as I understood, admittedly be properly deducted from the gains and profits earned in the authorized trades by the persons who pay them.

But even if it were otherwise, and the purpose for which the Legislature had appropriated the compensation contributions under the Licensing Act of 1904 were a legitimate matter for consideration in the decision of the question raised in this case, it does not, in my view, sustain, in any degree, the contention of the appellant. The contributions are appropriated to form a fund, out of which the publican and the other persons interested in the licensed premises are to be compensated for the loss of the licence by non-renewal.

The contribution is, therefore, in truth and fact, a payment by way of insurance premium against the loss of the licence, which means, in all cases as regards the publican, an insurance against the loss of his trade or business, and as regards the landlord in such a case as the present, primarily and mainly an insurance against the loss of a market for the sale of his beer, seeing that the purpose for which the licensed premises have been acquired was to secure a market. Incidentally, no doubt,

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it may also insure the company in the present case against the depreciation in the value of their premises caused by the loss of the licence. And if the respondents had acquired licensed premises as an investment, that might be the only loss insured against; but if, as is found, they have acquired them solely and exclusively for the purpose of securing an exclusive market, the paramount purpose of the payment must be to insure against the loss of that market. If a publican insure the licensed premises against destruction by fire, his paramount purpose is to insure against the loss of his trade and business, though incidentally he insures against the destruction of the fabric in which, apart from the licence, he may have little or no interest. Yet it is not, as I understood, contended that the payment of the premium in such a case should not be deducted from his receipts as an expenditure made wholly and exclusively for the purposes of his trade.

Lastly it was objected that the licence, which draws after it the liability to pay the compensation contribution, authorizes trading in several articles in addition to beer, and that the payment of the compensation or any part of it could not be held to be made wholly and exclusively for or in the interest of the trade in beer alone; and, no doubt, as far as the publican is concerned, that possibly may be so; but as far as the respondents are concerned they deliberately set up, wholly and exclusively for the purposes of their trade in beer, a system which necessarily subjects them to a liability for the share of the compensation contribution they claim to deduct. It matters not to them in respect of what trading, in addition to the trading in beer, the liability for the entire contribution is incurred. They deliberately assume the liability for the landlord's share of it, solely to get a market for their beer, and therefore the payment of it is a disbursement made wholly and exclusively for the purposes of their trade as vendors of beer.

Much reliance was placed by the appellants on the case of *Brickwood* v. *Reynolds*. (1) When that case is carefully examined it does not appear to me to be such a conclusive authority on the question for decision in this case as was suggested in argument.

(1) [1898] 1 Q. B. 95.

In that case repairs were executed by the lessors on the entire fabric of tied houses, parts of which were used as dwellings by the tenants, the publicans, and it was sought to deduct from the receipts from the landlord's business the entire cost of these repairs. The first point raised was that the houses were not occupied by the landlords (the brewery company) for the purposes of their trade, but were occupied by the tenants (the publicans) for the purposes of their trade; and that the expenditure could not therefore be deducted under the provisions of r. 3, case 1, s. 100, Sched. D.

At page 103 of the report A. L. Smith L.J. is reported to have referred to r. 1, applying to cases 1 and 2, and to have expressed himself thus: "In my opinion that provision" (i.e., the provision as to money wholly and exclusively expended for the purposes of the trade) "covers this case. It is impossible to say, upon the facts stated in the case, that the whole of the money expended in the repairs of these tied houses was expended exclusively for the purposes of the appellants' trade as brewers. It was expended for many other things, one being for the purposes of the trade of the publicans who occupied those houses." Well, it is clear, from the provisions at the end of r. 1, that the money expended for the repairs of the portions of the fabrics used as dwelling-houses by the tenants could not be deducted by either landlord or tenants. And this may have been, and probably was, one of the many things to which the learned Lord Justice alluded. And Rigby L.J. at page 105 of the report, in dealing with the same point, says: "In my opinion, this money, which was expended in the repairs of these tied houses, was not expended wholly and exclusively for the purposes of the trade. Even if it were conceded that the money was expended partly for the purposes of the trade—I am not at all sure that even that can be legitimately conceded—it certainly was not wholly and exclusively so expended."

It is clear, therefore, in my view, that it was not expressly decided in this case that the money expended on the repairs executed on the portions of the houses used for trade purposes could not be deducted. Moreover, the brewery company in that case were not expressly bound to repair, nor did it appear that

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the repairs were necessary for the proper carrying on of the publican's business. And, in any case, the expenditure is not analogous to that incurred in the present case in the obligatory discharge of an incumbrance imposed upon that interest in the premises which the company acquired for the sole and exclusive purpose of increasing the volume of their sales, and securing for their goods a higher price than they could otherwise obtain.

That case is not a binding authority on your Lordships, but, even if it were, it is, I think, distinguishable from the present case.

I am therefore of opinion that the decision of the Court of Appeal was right and should be affirmed, and that this appeal should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, the opinions which your Lordships have just delivered shew such a radical and complete difference of opinion that my own position is one of great difficulty. My two learned brethren who have preceded me have expressed diffidence in differing from the Lord Chancellor. My Lords, I express diffidence in differing from any one of your Lordships and in expressing an opinion either on the one side or on the other. With these cross-currents of feeling, my Lords, and having appreciated the difference that was to arise, I have made to the best of my power an independent investigation of the whole topic, and I think it best to proceed to read that judgment.

My Lords, the decision of your Lordships' House must proceed—and in this I am most happy to agree with the Earl of Halsbury—upon the facts as set forth in the stated case. The respondents are brewers and sell beer to what is known as tied houses. What is their situation in relation to these houses? The case states it thus: "The Lion Brewery Company, Limited (hereinafter called the respondents), are as part of their business and as a necessary incident of the profitable exploitation of such business the owners of certain freehold licensed premises and also lessees of other licensed premises, all of which premises have been acquired by the respondents and are held by them in the course of and solely for the purposes of their said business.

The said premises are let by the respondents to tenants who covenant to deal only with the respondents in the way of their business, and in consideration thereof and the purchase of beers from the respondents they pay a much less rent than the annual value of the premises would warrant. By these means and the possession and use of the said premises, which are employed by the respondents as substantially part of their plant or outfit necessary to carry on the business profitably, the respondents are enabled to earn, and do earn, profits upon which they pay income tax and which without the said premises and their use in and for carrying on their business would be much less in amount.

"The profits of the respondents have always been greatly increased by reason of the employment and use of such premises in and for the purposes of the respondents' business, and to enable the respondents to earn the profits upon which they are assessed to the income tax the possession and employment as aforesaid of such premises are essentially necessary, and except for the purposes of and employment in their business of such premises the respondents would not possess them. They do not possess them as investments or for the purposes of investments. If any house loses its licence the respondents as soon as possible get rid of it."

To this narrative it falls to be added that, as stated in the respondents' case in this appeal, "the licences current in respect of the said premises are all existing on licences within the meaning of the Licensing Act, 1904." By the definition clause of that Act the expression "on licence" means "a licence for the sale of any intoxicating liquor (other than wine alone or sweets alone) for consumption on the premises." In the argument it was taken that these licences were on licences in the full sense, that is to say, there were retailed, for consumption on the premises, spirits, wine, and beer, and that the licensees were bound to the respondents in a contract of exclusive dealing only in respect of beer. The respondents are not themselves occupants of any of the licensed premises.

The respondents own some of these houses, having the licensees as their tenants; they have others, having the licensees as their sub-tenants. For the purpose of your Lordships'

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decision, the point to be settled appears to me to be the same in either case; and I accordingly may, for the sake of greater simplicity of treatment, speak of the one case of ownership alone.

The relation in which the respondents stand to the licensed premises, which are their tied houses, being as above described, there falls upon the licensees of these houses, in terms of the Licensing Act of 1904, a liability to pay "together with and as part of the duties on the corresponding excise licence" charges at rates not exceeding those shewn in the maximum scale of the First Schedule to the Act. Such payments being made by the licensees, the Act, s. 3, sub-s. 3, provides that "such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section." In the present case these deductions from rent have been made, and the claim of the respondents is that they shall, in a question with the Inland Revenue, be treated as deductions from the profits of their wholesale business of brewers.

Before considering whether such a deduction from rent can be treated as a deduction from the wholesale business profits it is necessary to make clear what is the purpose for which the whole charges, including the deductions, have been levied. That purpose is to make up a fund known as the compensation fund, and treated in the Act as a fund out of which those interested in houses dispossessed of their licences on public grounds, such as the need for a reduction in the number of licences, are to be compensated in respect of such loss of licence. So far as the particular premises are concerned what is to be paid in respect of loss of licence is "a sum equal to the difference between the value of the licensed premises . . . . and the value which those premises would bear if they were not licensed premises."

The primary interest in the on licence is of course with the proprietor of the retail business for the supply of liquor for consumption on the premises. But the owner of the house is also interested, because if the business as a licensed one disappear, the value of his property in the market will suffer depreciation. So far as the owner of the premises accordingly is concerned, he,

by making this payment, insures his own proprietary interest, that is to say, he pays a premium against the depreciation of the premises in the property market. Whether a payment of that kind, fixed by the statute to be made as a deduction from the rent paid by the tenant, is a deduction falling under Sched. A, applicable to the relation of owner and tenant, is not a question in this case and has not been argued. The consideration of that question would depend solely upon the construction of the Acts relative to what are permissible deductions from or reductions of rent under Sched. A.

But the present case is pleaded as one falling under Sched. D. It is argued that the very owning of the property is a part of the means employed in the business without which the brewing profits "would be much less in amount," and that, therefore, the deduction from rent must be treated as a deduction from brewery profits. This question so stated might be of very great difficulty, and difficulties of that kind might confront the Revenue authorities on all similar occasions on which expenditure had been made, which was, so to speak, consequential upon the form in which the mechanism of the business had been built up, or, as the stated case has put it, incidental to its "exploitation." And, in my opinion, it is just for the sake of avoiding such difficulties that the statute itself has prescribed what and what alone are the deductions from profits which are permissible under the Act. One is accordingly driven to r. 1 of the first and second cases under Sched. D of the Act of 1842 (5 & 6 Vict. c. 35). This provides that "in estimating the balance of the profits or gains . . . . no sum shall be set against or deducted from . . . . such profits or gains for any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade." Sect. 159 of the statute further expressly forbids the making of any deductions other than those enumerated in the Act. The true question accordingly in this case is, in my judgment, that which has been put by my noble and learned friend the Lord Chancellor, namely, Is this sum wholly and exclusively laid out or expended for the purposes of the wholesale brewing trade carried on by the respondents?

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In my opinion, the words "purposes of such trade" do not mean the motives animating the minds of the traders, but do mean the purposes to and for which the money is applied and expended.

In regard to this case these moneys in the sense of the compensation charges or levies were expended as a whole for the purpose of securing that the premises should be continued on the list of premises licensed for the retail trade in liquor. Stated negatively they were expended to secure the retail trader against the discontinuance of a licence for his retail business; and, secondly, to secure the owner of the house against the discontinuance of the premises as premises in which a retail licensed trade could be carried on.

As a whole, therefore, if the word "exclusively" were applicable at all, it would be applicable, not to the wholesale business of a brewer, but to the retail business of the sale of intoxicating liquor for consumption on the premises.

Strictly, however, to confine the question to the case of the contribution made by the respondents, in the shape of a deduction from the rents received by them, that case is an owner's case; and with regard to these premises the payment falls upon the owner, whatever be the trade he is engaged in, and the purpose of the payment is to keep up the value of the premises as licensed premises whoever owns them. I respectfully agree with the opinion of the Master of the Rolls when he says of the owner, "if he is an ordinary non-trading landowner, he must bear his proportion of the compensation levy, and he cannot in any way bring it into account against the Crown." Neither the payment of the charge nor the scale of it can be avoided or altered by any reference to the owner's business relations with the licensee. The payment would be exigible although there were no such relations, and the scale is fixed by statute in proportion to the rental and period of occupancy, and to nothing else.

My Lords, this appears to me to demonstrate that a payment made by an owner, irrespective of whether he is in trade or is dealing as a trader with the premises, is a payment for the purpose of preserving the owner's rights as such, and cannot be

said to be exclusively devoted to the purpose of some business in which the owner happens to be engaged. In short, it seems to me difficult logically to affirm—and were it not for the opinion of some of your Lordships, and some of their Lordships in the Court below, I should deem it impossible to affirm—that a payment is exclusively devoted to the purpose of the wholesale brewing trade carried on by the owners of premises when the same payment to the same amount, and in respect of the same premises, would fall upon the owners, although they stopped the brewing business to-morrow or although they had never at any time been engaged in any business transactions with the licensee. I have, as I say, difficulty in seeing how an owner's payment can be said to be exclusively for the purpose of a brewer's trade when the payment would fall upon the owner, whether he was a brewer or not.

While the payment is not, in my opinion, "exclusively" for the brewing trade purpose, it appears also to be equally clear to me that it is not "wholly" for such a purpose. I may point out that even if it were maintained that the payment was to secure the continuing value of a brewery asset, still that asset was a value in a licence which was for wine, beer, and spirits. The payment undoubtedly was for the continuance of that licence as a whole, although the trading interest of the respondents with the premises had no reference to anything but beer. It is not difficult to figure cases in which, if an on licence in the full sense were reduced to a beer-house licence, the value of the premises would be greatly reduced, while the trade in beer therein with the wholesale brewer might not be reduced, but increased. It is to my mind fairly plain, therefore, that the payment by the owner, who happens to be a brewer, is a payment not exclusively devoted to the purposes of his brewing trade, but devoted to the purposes of a trade in wine and spirits as well as beer, and the deduction under the statute cannot accordingly apply.

In the argument I put the case of an on licence under which the profit of the trade in wine, in beer, and in spirits was fairly equal, one-third profit attaching to the retail sale of each of the articles. It hardly appears to me to be possible that a payment

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made, even on the assumption that it was for the purpose of keeping up the brewer's beer connection with the premises, can be said to have been wholly applied to and expended upon that, seeing that this formed only one-third of the business, and the other two-thirds of the interests covered by the payment had reference to a trade in other articles. Under the statute, however, a deduction, to be legitimate, must be both exclusively and wholly for the purposes of the respondents' brewing trade; whereas, even on the facts in the present case, it must be conceded that the payment was, in any view, partially for keeping up a trade in articles not supplied by the brewer.

I desire to repeat, however, that while this result is reached by a consideration of the limited nature of the owner's trade with fully-licensed premises, I think the same result is reached by a consideration that it is not qua trader, but simply qua owner, apart from being a trader at all, that the owner makes the payment, and that in such circumstances it cannot be soundly established that the payment so made is a deduction from trading profits under Sched. D.

I think, accordingly, that the judgment of the Court of Appeal should be reversed. In my opinion Channell J. and Kennedy L.J. came to a sound conclusion.

LORD LOREBURN L.C. My Lords, as there is an equal division of opinion in this House the rule semper praesumitur pro negante applies and the appeal will not prevail; but the practice of your Lordships is in such cases that there be no costs of the appeal to this House. I move your Lordships accordingly.

Order of the Court of Appeal affirmed and appeal dismissed: no costs of this appeal on either side.

Lords' Journals, February 14, 1911.

Solicitors: *Sir Francis Gore, Solicitor of Inland Revenue; Godden, Son & Holme.*

[HOUSE OF LORDS.]

WEST KENT MAIN SEWERAGE BOARD . APPELLANTS; H. L. (E.) 1911 March 21.

AND

ASSESSMENT COMMITTEE OF DARTFORD UNION AND OVERSEERS OF DARTFORD, CRAYFORD, AND BEXLEY PARISHES . . . . . RESPONDENTS.

THREE CONSOLIDATED APPEALS.

Poor Rate — Rateability — Sewers underground and overground — Payment received for Use of Sewers — Beneficial Occupation.

Under statutory powers the appellants acquired easements through lands in Kent and constructed and maintained main sewers which were laid partly in private lands and partly in public highways. Some of the sewers were wholly underground; the others were partly underground and partly overground. They were constructed and maintained by levying the statutory rates. The appellants made no profit from their occupation of the sewers, but received payments from occupiers of mills and other persons for leave to discharge their sewage or trade refuse into the sewers:—

Held, affirming the decisions of the King's Bench Division and the Court of Appeal (not reported), that sewers whether overground or underground are rateable where the occupation is "valuable" within the meaning of the authorities on rating, and that the appellants were rateable in respect of all the sewers.

West Ham v. *London County Council*, [1893] A. C. 562, 597, discussed.

THE circumstances of these three appeals are stated in the judgment of Lord Atkinson.

Feb. 17. *C. A. Russell, K.C.*, and *Ryde, K.C.*, for the appellants, contended that there was no such occupation of the sewers as to make the appellants liable to the poor rate; that sewers similar to the appellants' sewers had not in practice been rated to the relief of the poor, and that this House ought not to disregard a practice so long established and supported by high authority; that assuming the appellants to be not otherwise rateable they did not become rateable by receiving towards the

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cost of maintaining the sewers payments from local authorities and persons using the sewers; that a decision in favour of rating these sewers must lead to anomaly and confusion: see Ryde's Law and Practice of Rating, 2nd ed., pp. 142—146.

Hohler, K.C., and *Pitman*, for the respondents, contended that sewers similar to the appellants' sewers have been held to be rateable and are in fact rated; that the exemption from rateability which prevailed in some instances turned upon circumstances not existing in the present case; that however long settled an exemption may have been it ought not to be continued when it is discovered to be contrary to the intention of the Legislature or inconsistent with sound principle; that the receipt by the appellants of payments for the use of the sewers was of itself enough to make them rateable.

The cases of *West Ham* v. *London County Council* (1) and *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Assessment Committee of Newport Union* (2) and the authorities there quoted were fully discussed.

The House took time for consideration.

March 21. LORD ATKINSON. My Lords, the facts of these cases are not disputed. Certain main sewers belonging to the appellants, constructed by them under the provisions of several West Kent Main Sewerage Acts and several provisional orders duly confirmed by Parliament, run through the parishes of Bexley, Dartford, and Crayford amongst others, in the Dartford Union in the county of Kent.

In the parish of Bexley these sewers lie entirely underground; in both the other parishes a considerable portion of the sewers are laid overground, and the remaining portions underground, and all the appellants' main sewers are laid partly in private lands and partly in public highways. By three orders of the King's Bench Division (3) bearing date January 19, 1910, made upon three cases stated, it was, in effect, held that the appellants were liable as occupiers of the whole of these sewers to be rated

(1) [1893] A. C. 562, 597.
(2) [1901] 1 K. B. 406.
(3) Lord Alverstone C.J., Bucknill and Bray JJ.

and assessed for poor rate in each of the three parishes above mentioned.

On appeal to the Court of Appeal (1) these orders were confirmed, that Court considering, apparently, that the questions raised were covered by the decision of the Court of Appeal (2) in the case of *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Newport Assessment Committee* (3), called for convenience the Newport case.

The two principles established by this latter authority applicable to the present case appear to be (1.) that where the owners of such sewers as these receive from other bodies payments for permission to use the sewers, and the cost of constructing or maintaining the sewers is, to a substantial extent, defrayed out of these payments, the owners of the sewers, whether the latter be laid above or under ground, are rateable in respect of them as occupiers ; and (2.) that the portion of a main sewer lying in one parish, part being laid underground and part overground, must be treated as one continuous structure and dealt with as a whole; that the part below the surface should not be dissevered from the part above it, taken as an independent sewer, and separately treated for the purpose of rating.

These two principles were assailed in argument as illogical, unsupported by authority, conducive to grotesque results, and contrary to common sense and reason, and they were only defended, as I understood, as desperate attempts to escape from the illogical and anomalous position into which the law dealing with the rateability of sewers had been brought by the principles laid down in the judgment of Lord Herschell and the decision of your Lordships' House in the case of *West Ham* v. *London County Council.* (4)

I confess it appears to me that this is the only ground on which the decision can be defended. The worst of it is, however, that these principles lead in their application, as was shewn by Mr. Ryde in argument, to anomalies as great and grotesque as

(1) Vaughan Williams, Fletcher Romer L.JJ.
Moulton, and Farwell L.JJ.
(2) A. L. Smith M.R., Collins and
(3) [1901] 1 K. B. 406.
(4) [1893] A. C. 562.

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that from which it was heroically attempted to escape. If the first of the two principles thus laid down were sound, the appellants would be rateable as occupiers of their sewers in each of the three parishes of Bexley, Dartford, and Crayford, for, according to the special cases stated, though they do not and cannot make any profit from their occupation of the sewers, yet they receive in each parish payments from millowners and outside authorities for permission to discharge sewage into the portions of the sewers in these respective parishes.

It was contended, on behalf of the appellants, that underground sewers had never been treated as rateable hereditaments, and that it had been laid down by Lord Herschell in his above-mentioned judgment, with the concurrence of the noble Lords then present, though not actually decided, that owing to the antiquity of this exemption, and to the many interests which have been created, and obligations which have been incurred on the faith of its continuance, they never should be treated as rateable.

The actual question for decision in that case was whether the appellants were liable to be rated in respect of their occupation of the outfall mains or sewers mentioned in paragraph 3 of the special case, set out at p. 572 of the report. They are thus described: "So much of the outfall mains or sewers as are situate in the said parish are constructed in an embankment upon land purchased by the Metropolitan Board of Works for such purpose and occupying in all about thirty-seven acres."

And the contentions put forward by the two contesting parties, the London County Council and the churchwardens of West Ham respectively, are fully set forth in paragraphs 9 and 10 of the case, p. 573 of the report. The former body relied, in support of the exemption from rateability, on the case of *Metropolitan Board of Works* v. *Overseers of West Ham* (1), and the latter, in support of the rateability, on the case of *Burton-on-Trent Corporation* v. *Overseers of Egginton.*(2) The second of these cases deals with a sewage farm, and need not be examined, but in the first it is distinctly laid down by each of the three learned judges who took part in the decision, namely, Mellor, Lush, and

(1) (1870) L. R. 6 Q. B. 193. (2) (1889) L. R. 24 Q. B. D. 197.

Hannen JJ., that there is no difference whatever as to rateability between underground and overground sewers. Mellor J. at p. 197 says: "There is no distinction for the purposes of our decision between a sewer underground and one carried on an embankment. Both are incapable of beneficial occupation, and are, therefore, not rateable." Lush J. on the same page says: "The only difference between this case and *Reg.* v. *Metropolitan Board of Works* (1) is that here the sewer is above the surface, there it was under the surface; but the principle upon which that case was decided applies equally to the present. The question is whether the subject-matter of the rate is capable of a beneficial occupation. If in its present condition it can produce no profit to the board it cannot be supposed that any person would take it as a tenant and pay rent for it."

And Hannen J. at p. 198 says: "I think as to the thirty-seven acres we are bound by *Reg.* v. *Metropolitan Board of Works.* (1) The judgment of the Court did not proceed upon the fact that the sewer was underground, but on the fact that the land occupied by the sewer was incapable of a beneficial occupation." The ratio decidendi in this last-mentioned case is put by Lush J. at p. 26 of the report in this short passage: "As regards the sewers, we are of opinion that they are not rateable on the short ground that they are not at present the subject of a beneficial occupation. No payment is made to the board for the use of them; the rates which they are empowered to levy are for the expense of construction and maintenance, and nothing more. Their occupation yields no profit to the board, as occupiers, either actual or potential." The principle thus stated was not new. It was apparently applied so long ago as the year 1810 in *Rex* v. *Sculcoates.* (2) And it was stated in argument in *Reg.* v. *Metropolitan Board of Works* (1) that the Commissioners of Sewers, the predecessors of the Metropolitan Board of Works, though they had existed from the reign of Henry VIII., were never rated for the relief of the poor in respect of the sewers they owned and occupied. Yet, despite the antiquity of the exemption, your Lordships' House, in the case already referred to, decided that it was based on a false principle, namely, the principle that the occupation of a

(1) (1868) L. R. 4 Q. B. 15. (2) (1810) 12 East, 40.

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hereditament which renders the occupier liable to be rated must be "profitable," as distinguished from "valuable"; and further decided, regardless of the consequences which might follow, that the particular sewers whose rateability was the question for decision were not exempted, but were rateable. Owing, however, to the use made in argument of the judgment of Lord Herschell it is necessary to examine it critically.

He recognizes clearly the new principle laid down in the case, namely, that the occupation of a hereditament which is rateable is merely "a valuable occupation" as distinguished from "a profitable occupation," and that public bodies who make and occupy public works or buildings for public purposes may, for the purpose of deciding whether the occupancy is "valuable" or not, be regarded as possible hypothetical tenants of them from year to year. The exemption of drains, he thought, was anomalous. I think he clearly meant his remarks to apply to all drains, not merely to the particular drain the rateability in respect of which was the matter for decision, nor yet exclusively to the drains of the London County Council, since there is nothing special to distinguish these latter from those of other municipal bodies, who raise by rates all that is necessary to make and maintain their sewers. On p. 598 he is, I think, dealing with the general principle upon which the drains of the Metropolitan Board of Works had been theretofore held to be exempted. The same may be said of the first part of p. 599.

Reading from the end of the second paragraph, on p. 599, to to the end of his judgment, on p. 600, it would appear to me that what the noble Lord in effect says is this: The general exemption of all sewers from rateability, though based upon a false principle, and, by the test of rateability we now lay down, anomalous, has lasted so long, and been so long acted upon, that it would be inexpedient to abolish it altogether; but there are special circumstances connected with the particular sewer, rateability in respect of which is the question for our decision, which enable us to place it outside the general exemption, to make it an exception, namely, this, that "it is carried in an earthen and concrete embankment erected upon the land." . . . . "It differed from the mere creation of a sewer below the surface of

land which continued afterwards, as before, liable to assessment, but was an adaptation to the purposes of this board of land already occupied and rated. I confess I see the utmost difficulty in distinguishing such an erection as this upon the surface of land from any other erection specially suitable for the purposes of a particular occupier, but which might render it of less value for occupation by other persons not requiring it for that special purpose."

It is upon this last-mentioned fact that the decision of the House in the case was based. The expression of the opinion as to the expediency of continuing the exemption from rating, when facts similar to those just mentioned do not exist, even if such as I take it to be, was not necessary for the decision. It was merely an obiter dictum, entitled, no doubt, to the utmost respect, but not absolutely binding on your Lordships' House as an actual decision of a specific point would be. The exemption itself was admitted to be illogical and anomalous. This case shews that in practical working it is difficult to observe it. There is, in the nature of things, no conceivable reason why occupiers of sewers should escape, and occupiers of water mains, gas mains, and such like be rated, as it is conceded they are.

The most important question, however, remains, namely, whether this House ought still to be deterred, despite the difficulties which have arisen in rating operations, from sweeping away this anomalous exemption, and putting the law in respect to the rating of sewers on the sound and rational basis upon which the law has by recent authorities been put in respect of other rateable subjects of property, simply because it might place unforeseen burdens on sewer authorities, or render more onerous the engagements into which they have heretofore entered in the belief that the anomaly would continue.

For myself, I may say I think that to adhere to the admitted error after it is shewn, as it has been shewn in this case, that the old and vicious principles are unworkable, and must in their practical application multiply anomalies and perpetuate injustice, would be, as Lord Macnaghten has, in *Hamilton* v. *Baker* (1), pointed out, "to give the effect of legislation to a

(1) (1889) 14 App. Cas. 209, 222.

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decision contrary to the intention of the Legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time."

It should, in my view, be now decided that sewers, whether overground or underground, are rateable wherever the occupation of them is "valuable" within the meaning of the authorities dealing with rating, and that for this reason, and not at all on the grounds relied upon in the King's Bench Division or the Court of Appeal, the decision appealed from should be affirmed and the appeal dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I have had the advantage and the pleasure of reading more than once the judgment which has just been delivered, and I agree entirely with that judgment.

LORD LOREBURN L.C. My Lords, I also agree with the opinion of my noble and learned friend Lord Atkinson, and I have been requested by my noble and learned friends Lord Ashbourne and Lord Mersey, both of whom are unable to attend to-day, to say that they also concur in that opinion.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 21, 1911.

Solicitors: *May, Sykes & Co.; Pyke Parrott & Co., for J. & J. C. Hayward, Dartford.*

Applied. R. *v.* Paddington and St. Marylebone Rent Tribunal. [1949] 1 All E.R. 720.

[HOUSE OF LORDS.]

BOARD OF EDUCATION . . . . . Appellants; AND RICE and Others . . . . . Respondents.

H. L. (E.) 1911 *April* 6.

Education—Public Elementary School—Provided and Non-provided Schools—Local Education Authority—Teachers' Salaries—Right to differentiate—Failure to maintain and keep efficient—Board of Education—Decision of Board—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 3; *s.* 16.

The duty of maintaining and keeping efficient a non-provided school imposed upon a local education authority by s. 7 of the Education Act, 1902, is a matter which can be a "question" between the authority and the school managers so as to come within the jurisdiction of the Board of Education.

A local education authority refused to pay salaries to teachers in a non-provided school at the same rate as it paid the teachers in provided schools. The managers of the non-provided school complained, and the Board of Education directed an inquiry, the result of which was a report that the local education authority had failed to maintain the school and keep it efficient. The "questions" required by s. 7, sub-s. 3, to be determined by the Board of Education were: "(1.) Whether the local education authority have in fixing and paying the salaries of the teachers fulfilled their duty under s. 7, sub-s. 1, of the Act; (2.) whether the salaries inserted in the teachers' present agreements are reasonable in amount and ought to be paid by the authority, or what salaries the authority ought to pay." The Board purported to give its decision in a document which failed to deal with the matters in issue:—

Held, that inasmuch as the Board had not determined the questions, the decision must be quashed by certiorari, and a mandamus must issue commanding the Board to determine the questions.

The right of a local education authority to differentiate between schools in regard to the scale of salaries or the standard of efficiency, in the absence of special circumstances appropriate to the differentiation, discussed.

Decision of the Court of Appeal, [1910] 2 K. B. 165, affirmed.

The circumstances of this appeal are set forth in the judgment of Lord Loreburn L.C.

Feb. 23, 24; March 3. *Sir Rufus Isaacs, A.-G.* (*Sir John Simon, S.-G.*, and *Rowlatt* with him), for the appellants, contended as a matter of law that the duty of maintaining and keeping

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efficient a non-provided school, though in terms imposed by s. 7 of the Education Act, 1902, was not a matter which could be a "question" between the local education authority and the managers so as to come within the jurisdiction of the Board, and referred to s. 16: that the decision of the Board was upon the evidence a full and right decision, and being final could not be appealed from or in any way contested. All the points taken for the appellants are fully dealt with by the Lord Chancellor's judgment.

Sir Robert Finlay, K.C., C. A. Russell, K.C., A. T. Lawrence, and *R. P. Hills,* for the respondents, were not heard.

The House took time for consideration.

April 6. LORD LOREBURN L.C. My Lords, I believe your Lordships were all of opinion at the conclusion of the Attorney-General's argument that this was a proper case for a certiorari and a mandamus.

It is unnecessary to enter in detail upon the protracted dispute between the Swansea Local Education Authority and the managers of the Oxford Street voluntary schools, technically termed "non-provided" schools. Certain salaries were paid to teachers by the local education authority in the "provided" schools within their area. Smaller salaries had been paid to the teachers in the voluntary schools prior to the Act of 1902, and after that Act passed the same system of paying smaller salaries was continued. Then some of the teachers gave notice upon the ground that their salaries were inadequate and below those paid to their comrades in the provided schools. And the managers of the Oxford Street schools pressed upon the local education authority the fact that they were able to keep their teachers only by finding out of their own pockets, or by the assistance of well-wishers, the difference between the two scales of salary. They claimed that by refusing to level up those salaries to the same scale the local education authority had failed to discharge its statutory duty of maintaining and keeping efficient the Oxford Street schools. Mr. Hamilton, K.C., who was sent down to inquire and report to the Board of Education in

London, reported that there had been such a failure. And upon all the evidence before the House there can be no manner of doubt that he was right.

Such is the outline of this controversy between the local authority and the managers in Swansea, sufficient for my present purpose, though it was spread over a great mass of correspondence, argument, and evidence, and lasted for a long time. At length the questions in issue came up for decision by the Board of Education in London, and it is their action which is the subject of the order made by the Divisional Court, confirmed by the Court of Appeal, and now ripe for final adjudication by this House.

I proceed now to consider what is the statutory duty laid upon the Board of Education in regard to disputes of this kind.

Their duties, so far as concerns the present litigation, are twofold. In the first place they are required by s. 7, sub-s. 3, of the Act of 1902 to determine a certain class of questions. The words of the sub-section run as follows: "If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education."

The Attorney-General argued, as I understood him, that the questions here pointed at are only such as arise from the statutory relations between a local education authority and managers, and are not such as arise from the duty of one or other toward the public. He contended that the duty of maintaining and keeping efficient a non-provided school, though it is in terms imposed by s. 7 of the Act, is not a matter which can be a "question" between the local education authority and the managers, so as to come within the jurisdiction of the Board. I cannot accept this view. The managers are directly interested in the proper maintenance. They are the persons primarily to call upon the local education authority for such proper maintenance. And I do not understand how it can be held that if they do so call upon the local education authority, and the latter disputes the point, it is not a question arising between them. Equally, I fail to understand how it can be held that such a question is not one arising under s. 7,

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for it is only under s. 7 that the duty is created. And all questions arising under s. 7 are to be determined by the Board of Education by virtue of the 3rd sub-section.

Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the Board under s. 7, sub-s. 3, of this Act. The Board have, of course, no jurisdiction to decide abstract questions of law, but only to determine actual concrete differences that may arise, and as they arise, between the managers and the local education authority. The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

In the second place the Board are authorized, by s. 16 of the Act of 1902, to make such order as they think necessary or proper for the purpose of compelling the local education authority to

fulfil its duty, if after holding a public inquiry they think it has failed to fulfil any of its duties under the Act of 1902. This is a perfectly distinct thing from what is prescribed by s. 7, sub-s. 3. It is designed to enable the Board of Education, if they think it right, to make an order and to enforce by application to the Courts of law obedience to such order as they may make. It does not deal with the determination of disputes between a local education authority and managers, though if such dispute is decided one way and the local education authority refuses to act in accordance with the decision, its refusal may be followed by an order under s. 16 and by an application to the Court to enforce it. In the coil in which this quarrel, simple as it is in itself, has been entangled, this distinction may have been somewhat overlooked.

In some of the judgments in the Courts below it is affirmed as matter of law that under this Act a local authority is not entitled to differentiate between schools in regard to the scale of salaries or the standard of efficiency in the absence of special circumstances appropriate to the differentiation. If a local authority does discriminate without such circumstances, it would be cogent evidence of an intention to starve the less-favoured schools. But it would be no more than evidence of such an intention, all the more cogent if the discrimination were due to political or sectarian prepossessions. I do not find anything, however, in the statute itself which prohibits the local authority from doing for some schools more than it does for others, even if the circumstances are indistinguishable. Suppose, for example, that the managers of a school were to say to the local authority, "We admit you are keeping our school efficient, yet you are giving to other schools benefits which you do not give to us," that would not be, in my opinion, a ground of complaint under the Act. I say nothing as to any remedy which ratepayers might have against the local authority upon the ground that it was misapplying public money in giving to the preferred school more than was justifiable. On that I express no opinion. But the managers have no right to claim more for their school than the Act requires merely because the local authority spends on other schools more than the Act requires. And I can see that, if each school, though

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already maintained in efficiency, were entitled to claim as a matter of right that it should in all points be put on a level with any other school, it might lead to much wasteful rivalry. At the same time I must observe that such treatment is a strong circumstance which the Board of Education are bound to scrutinize, in order to satisfy themselves that the discrimination does not involve any lowering of the proper standard of efficiency in the schools for which less is done. More than this I do not think the Act of 1902 prescribes. There is no canon that the Board must regard discrimination, even if the circumstances are the same, as conclusive proof of a failure to maintain and keep efficient the less-favoured schools.

Such being the duties of the Board of Education, I next inquire what it is that they have done. They have purported to determine a question under s. 7, sub-s. 3, of the Act which I do not think was really that which arose between the parties.

I have carefully considered the correspondence, the resolutions, the statements on either side, and the findings of Mr. Hamilton, K.C. To my mind it is clear that from beginning to end the managers said in slightly varying words the selfsame thing, namely, " The local authority is bound to maintain and keep efficient our schools ; they are failing to do so in that they will not pay the teachers salaries which we have found it necessary to pay."

In the course of the controversy they urge that the local authority is in the matter of teachers' salaries discriminating, and that it is not entitled to discriminate between provided and non-provided schools ; that the salaries which alone the local authority will sanction are below the market rate ; that the object of the Education Act of 1902 was to put all schools of both classes upon an equality. These are arguments or reasons on their side in support of their view that the local education authority shall pay them the necessary money, and have wrongfully refused to do so.

On the other side the local authority deny that they have failed to maintain and keep efficient these schools, and refuse to pay the teachers' salaries which the managers have found it necessary to pay. They, too, advance their reasons and

arguments—that they are the sole judges of what should be paid, that they have paid enough to keep the schools efficient if only the managers made the most of it, and that they are entitled to discriminate. I need not elaborate further the contentions on either side.

In my opinion the questions which the Board of Education was required by s. 7, sub-s. 3, of the Act of 1902 to determine in this case are accurately stated at the end of Mr. Eden's letter of February 3, 1908, on behalf of the managers in the following terms:—

(1.) Whether the local education authority have in fixing and paying the salaries of the teachers fulfilled their duty under sub-s. 1 of s. 7 of the Act.

(2.) Whether the salaries inserted in the teachers' present agreements are reasonable in amount and ought to be paid by the authority, or what salaries the authority ought to pay.

I am of opinion that the Education Board have not really determined these questions in the document of December 17, 1908, which purports to be their decision. (1) I think there has been a confusion between the points that were to be decided and the arguments of either side, and perhaps also a confusion between the Board's duty under s. 7, sub-s. 3, and their duty under s. 16. The managers were entitled to an explicit determination of the questions which they raised. This they have not obtained, and though in the mass of mixed argument and assertion which lasted over years, and was complicated by other disputes which have now been settled, there may have been room for misunderstanding, the true questions were those formulated in Mr. Eden's letter of February 3, 1908, which I have already quoted. That suffices to dispose of the case, and I move your Lordships to dismiss this appeal with costs.

EARL OF HALSBURY. My Lords, I am of opinion that this judgment ought to be affirmed. The duty of the education authority was to keep the schools efficient; this duty they neglected, and did not keep the schools efficient. The local

(1) See *Rex* v. *Board of Education*, [1910] 2 K. B. at p. 168, where the document is set out.

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education authority assumed to itself an absolute autocratic authority as to what schools they would keep efficient, and I cannot doubt for myself that they thought they were entitled to starve the Church schools and give advantages to the provided schools which they would not grant to the Church schools. It is impossible to resist the conclusion that this was done from hostility to the Church schools.

My Lords, I do not think it worth while to review the somewhat circuitous path by which this question has been brought before your Lordships' House. It is enough to say that it has quite rightly been so brought. The substance of the dispute is what I have stated, and it is clear that the local education authority ought to be as impartial as the rate collector who demands the rate without reference to the peculiar views of the ratepayer.

I quite agree with the Lord Chancellor, that it would be absurd to cavil at some differences between one school and another, and upon a mere difference between what was provided for one and another. We are far removed from such a question here. As I have said, here is a question of difference traced simply to the fact that one is provided and the other is not. No question has been raised that would justify such a difference as was here made. The local authority gave no evidence or argument, but relied upon their absolute authority.

The Master of the Rolls has, I think, put the question very plainly and given the answer with which I entirely concur.

The question was not, he says, whether the Oxford Street school was efficient in the sense of being able to earn a Government grant, but whether there were any circumstances in the case of the Oxford Street school such as to justify the different treatment.

There is nothing in the Board's decision to indicate that the right to discriminate about which the whole battle raged had ever been challenged. Still less is there anything to indicate the view of the Board as to the existence of such a right.

I have no doubt that no such right exists, and as the decision of your Lordships' House is unanimous, I cannot doubt that the local authority will willingly now acquiesce in that unanimous view, and perform the duty which, under a misapprehension of

these rights, they have hitherto neglected. The Board ought to have answered the questions asked by Mr. Eden and none other.

LORD ATKINSON. My Lords, I concur in both the judgments which have been delivered.

LORD SHAW OF DUNFERMLINE. My Lords, I concur in the judgment of the Lord Chancellor, and I desire to add two statements in the light of which this concurrence will, I trust, be read.

With regard to the local education authority, that authority is not before us, and we have not had the advantage of hearing their views presented at your Lordships' Bar. Speaking, therefore, for myself, I am not satisfied that any observation reflecting upon their conduct would be justified from me.

On the point of discrimination, my Lords, I desire to say this, that where the circumstances are the same, discrimination primarily requires justification. But, on the other hand, this state of circumstances, that is to say, a state of complete similarity,—in the varying conditions as to schools, staffs, localities and otherwise—may be most infrequent, and to apply the same standard to dissimilar circumstances is in my humble judgment itself such a discrimination as would also require justification.

The point really underlying these two questions which are now remitted to be answered is whether in the individual case, and apart altogether from reference to other cases, or to a general standard, efficient education has or has not been provided in the particular school. To that as the ultimate issue the attention of the parties must be directed. I do not doubt that the local education authority must act impartially, but upon the whole I desire to interpose these observations to my assent to the judgment proposed from the woolsack.

LORD MERSEY. My Lords, I entirely concur.

Orders of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 6, 1911.

Solicitors: *Solicitor to the Treasury; Crawley, Arnold & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1911 *April* 3.

SMITH . . . . . APPELLANT;

AND

GENERAL MOTOR CAB COMPANY, LIMITED . . . . . RESPONDENTS.

Employer and Workman—Compensation—Taxi-cab Driver—"Workman"—"Contract of Service"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

The findings of fact by a county court judge sitting as an arbitrator under the Workmen's Compensation Act, 1906, cannot be set aside if there was evidence to support the findings. The question whether there was evidence is a question of law.

The respondents let out a taxi-cab to the appellant, who was injured by an accident while he was driving the cab. Upon an application for compensation under the Act there was evidence that the relation of the respondents to the appellant was that of bailor and bailee of the taxi-cab, and the county court judge found as a fact that that was the true relation and that there was no contract of service:—

Held, that the finding could not be set aside, and that the appellant was not entitled to compensation.

APPEAL from an order of the Court of Appeal refusing to disturb the finding of a county court judge in a matter under the Workmen's Compensation Act, 1906.

The respondents let out a taxi-cab to the appellant under the circumstances stated in the judgment of Judge Woodfall as follows:—

Practically the facts are not in dispute in this case. The respondents are the owners of taxi-cabs which they let out to licensed drivers. These drivers ply for hire and pay for the cabs 75 per cent. of their takings. They compulsorily buy their ordinary supply of petrol from the respondent company, but, on emergency, are at liberty to purchase elsewhere. The drivers are compelled, when driving, to wear the livery cap as well as the leggings and breeches, which they purchase from the respondents, the latter lending them coats and mackintoshes. There are a certain number of regular drivers, that is to say, men who apply every day for a cab. In addition there are a number of

"odd men," that is to say, men who attend at a certain hour each day on the chance that the regular drivers may not have attended, in which case the cab is let out to them. The applicant is an "odd man," and he states that sometimes a week has gone by without his getting a cab. The drivers are entirely free and uncontrolled. They may apply for a cab if it suits them, and may take it where they please. They may ply for hire diligently or the reverse as it suits them. The company exhibits the notices which are in evidence, but, in my opinion, these are regulations for the efficient carrying on of the company's business, and compliance with which is a condition of the contract between the company and the driver being entered into at all. It appears to me that the acquiescence of the applicant in these regulations is far from proving a contract of service, and on this point I refer to the case of *Fitzpatrick* v. *Evans*. (1) The company enforces these regulations and gets rid of an unprofitable or undesirable driver by refusing to let him have a cab. And, as on the one hand there is no contractual obligation on the company to let any particular driver have a cab, so on the other there is no obligation on the drivers to attend and apply for one.

In my opinion the contract between the respondents and the applicant lacks every incident of a contract of service. No wages are paid. No notice of termination on either side is given or is necessary. No control of the work is exercisable by the respondents. I should describe the drivers as clients of the company and bailees of the cabs.

I do not attach importance to the use of the words "dismiss" and "discharge" in the company's notices, because it is clear that the only power in the respondents is to refuse to let a driver take out one of their cabs, and it is as conclusive in my opinion that if for any reason the company so refuses the driver has no remedy. Having regard to the decision of the Court of Appeal in *Doggett* v. *Waterloo Taxi-Cab Co.* (2), I should have felt no doubt on the matter but for the case of *Rex* v. *Solomons*. (3) But I have come to the conclusion that if in that case the jury in effect found Solomons was a servant of the company the

(1) [1902] 1 K. B. 505, 509. (2) [1910] 2 K. B. 336.
(3) [1909] 2 K. B. 980.

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verdict does not bind me as to my finding on the present evidence. It is a curious case, but I suppose the indictment has been fully set out in the report. Anyhow I do not think the finding in that case binds me or entitles me, on the present evidence, to find otherwise than I am doing.

In case of a successful appeal, I add that I find that the applicant has been from the date of the accident, and is now, incapacitated from following his employment. His average weekly earnings are admitted to have been 2*l.* a week.

The application must be dismissed.

This decision was affirmed by the Court of Appeal (Cozens-Hardy M.R., Farwell and Kennedy L.JJ.). Hence this appeal.

Feb. 13. *John O'Connor* and *Edmond Browne*, for the appellant.

C. A. Russell, K.C., and *Gilbert Beyfus*, for the respondents.

The House took time for consideration.

April 3. LORD ATKINSON. My Lords, this is a most hopeless appeal. It would appear to me to be founded on a disregard or forgetfulness of the fact that it is a well-established principle that the county court judge sitting as an arbitrator under the provisions of the Workmen's Compensation Act, 1906, is as absolute a judge of fact as a jury in a trial at nisi prius, if, indeed, not more absolute, and that his decision can only be reviewed by the superior Courts on questions of law.

Whether there was any evidence before the arbitrator in any given case proper for his consideration and on which he could reasonably act to sustain his finding on an issue of fact is a question of law, and his findings on such issues have often been set aside on the ground that there was an absence of such evidence, as was done in *Doggett* v. *Waterloo Taxi-Cab Co.* (1)

The point in controversy, on which the decision of this case turns, was what was the true nature of the relation between the respondents and the appellant. Was it that of master and servant, or bailor and bailee of the taxi-cab of the respondents of which the appellant was the driver?

(1) [1910] 2 K. B. 336.

It was not, it could not be, contended that all the terms of the contract entered into between the parties were embodied in a written document, the proper construction of which was a matter of law. Neither could it be contended that the respondents expressly admitted that the appellant was their servant, nor, as it would appear to me, that they admitted any fact or facts from which such a conclusion must necessarily be drawn as a matter of law. On the contrary, the respondents at the hearing contended, rightly in my opinion, that the wording of the document signed by the appellant (1), the absence of all control over him once he had driven the cab out of the garage, and the casual nature of his employment, were all pieces of evidence which went to shew that the relation between the parties was that of bailor and bailee, while the appellant on the other side as resolutely contended that the wearing of livery, the percentage of the earnings retained, the mode of accounting for the receipts, the deposit of his licence, and the words "dismiss" and "discharge," used in certain notices, were all persuasive pieces of evidence to shew that the true relation between the parties was that of master and servant.

The facts relied upon by the respondents were undoubtedly evidence of a bailment of the cab, upon which the county court judge could properly act; those relied upon by the appellant may have been evidence, strong evidence if you will, that the driver was the respondents' servant; but if so, the finding of the county court judge that the appellant was a bailee was a finding on conflicting evidence on an issue of fact. So that the appellant is driven to this position, that he must contend that, had the case been tried before a judge and jury, the judge would have been bound to direct the jury to find a verdict for the plaintiff, on whom the burden of proof of service lay, a contention absolutely unsustainable.

It may be necessary to point out that the decision of your Lordships' House on this appeal does not in any way touch the

(1) "I, the undersigned driver, hereby declare that I have taken the cab bearing the above numbers in good condition, with full kit of tools, tariff, and police plates properly affixed, and with my badge and licence. I will be personally responsible for any violation of the police regulations."

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question of the liability of the cab proprietor to third parties, passengers, wayfarers, or others, for the acts of the driver. It may well be that though the relation between the taxi-cab owner and his driver inter se be that of bailor and bailee, the driver may still quoad third parties be treated as the agent of the proprietor authorized to ply for hire in the streets for reward to the latter; and the proprietor be thereby rendered liable for those acts of the driver which were within the scope of the latter's authority. The general result of the cases of *Fowler* v. *Lock* (1), *Venables* v. *Smith* (2), *King* v. *London Improved Cab Co.* (3), *Smith* v. *Bailey* (4), and *Gates* v. *R. Bill & Son* (5), cited in *Doggett's Case* (6), is that in the case of horse-drawn cabs, where drivers were given them in charge under terms resembling those admitted to exist in the present case, the relation between the proprietor and driver was that of bailor and bailee, but that quoad third parties the drivers were, under the provisions of the Metropolitan Hackney Carriage Act, 1843 (admittedly applicable to taxi-cabs), deemed to be the servants of the proprietors.

The decision appealed from was, in my opinion, absolutely right. Kennedy L.J. in his short judgment puts the case in a nutshell. (7) I should like, if I may, to adopt that judgment as my own. I think that the appeal should be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, in this case I have only three propositions to state,—each in a sentence.

In my opinion quoad the cab, the contract was an ordinary contract of locatio rei. Quoad the public, the relation of the cab-driver to the cab owner was, in my opinion, one of agency; so that, for negligence in the conduct of his business, both principal and agent might naturally be responsible to the public.

(1) (1872) L. R. 7 C. P. 272.
(2) (1877) 2 Q. B. D. 279.
(3) (1889) 23 Q. B. D. 281.
(4) [1891] 2 Q. B. 403, 405.
(5) [1902] 2 K. B. 38.
(6) [1910] 2 K. B. 336.
(7) KENNEDY L.J. I am of opinion that in this case we cannot possibly interfere with the finding of the learned county court judge. It seems to me that he did not misdirect himself in law, and that the findings of fact are certainly justified by the evidence as conclusions which he might draw from that evidence.

Quoad the employer himself, the question whether the relation of master and servant existed between the employer and the driver is one of fact. The fact has been found in this case, that no such relation did exist. That point depends on many circumstances,—the scope of the employment, the form of remuneration, the scope within which the person driving the cab has power to regulate his own times and seasons, or to drive or not to drive the cab as he wishes. These are familiar illustrations of the variety of things to be considered. I think that there was in this case ample evidence to confirm the finding of the county court judge.

I concur in the course proposed.

EARL OF HALSBURY. My Lords, I agree.

LORD ASHBOURNE. My Lords, I concur.

LORD MERSEY. My Lords, I agree.

LORD LOREBURN L.C. My Lords, I agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, April 3, 1911.

Solicitors: *Pattinson & Brewer; Beyfus & Beyfus.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1911 *Feb.* 20.

LINDSAY AND OTHERS . . . . . APPELLANTS;

AND

KLEIN AND OTHERS . . . . . RESPONDENTS.

THE TATJANA.

Ship—Seaworthiness—General Average—Onus of Proof.

A steamship started on a voyage from Libau to Leith with a general cargo. A few hours after she put to sea her feed pumps broke down with the result that the boilers had to be fed with sea water by means of the donkey engine. She met with bad weather and put into Elsinore for repairs after sustaining damage to ship and cargo. Particular average charges were incurred at Elsinore in connection with the discharge, reconditioning, and reloading of the cargo. In an action by the shipowners to recover from the owners of the cargo a contribution to general average and also a proportion of the charges incidental to the discharging and reloading of the cargo :—

Held, reversing the decision of the First Division of the Court of Session, that the defendants were not liable, for in the circumstances the onus was on the plaintiffs of shewing that the ship was seaworthy at the commencement of the voyage, and they had failed to discharge that onus.

APPEAL from a decision of the First Division of the Court of Session, Scotland. (1)

This was an action brought by the respondents, registered owners of the steamship *Tatjana*, and as representing the other owners, against the appellants, Lindsay and others, grain merchants in Leith and holders of bills of lading for part of the cargo, for a proportion of general average for the repair of the vessel at Elsinore, and also a proportion of the expenses of unshipping, drying, and reshipping the cargo.

The facts are fully given in the opinion of Lord Shaw of Dunfermline.

1910. July 1, 4, 5. *Horne, K.C.*, and *C. E. Lippe* (both of the Scottish Bar), for the appellants. The claim against the

(1) 1910 S. C. 231.

appellants is for their proportion of a general average contribution, and secondly for a contribution towards expenses incurred in the course of the voyage by the respondents in unloading and reloading the cargo. The facts prove that the *Tatjana* was unseaworthy at the time she started on the voyage from Libau, and the shipowners cannot make good their claim, inasmuch as there was a breach of their obligation to provide a seaworthy ship. The inevitable inference from the facts and history of the ship was that the cause of the breakdown was in existence at the time the vessel left port. That inference placed the onus on the respondents to prove that the ship was seaworthy before sailing: *Steel* v. *State Line Steamship Co.* (1); *Gilroy, Sons & Co.* v. *Price & Co.* (2); see also *The Schwan* (3); *Watson* v. *Clark* (4); *Westoll* v. *Carter* (5); and Lord Lindley in *Ajum Goolam Hossen & Co.* v. *Union Marine Insurance Co.* (6) The donkey engine was one of the main fixtures of the ship, and if it had been connected with the hot well there would not have been any necessity to go into Elsinore at all, and the charges would not have been incurred. The question is, would a prudent shipowner, knowing this connection to be absent, have gone to sea? On the facts it is impossible to say that the *Tatjana* had that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of a voyage. In any event the appellants are not liable to be charged for unloading and reloading the cargo, for the shipowner did this without communicating with the owners of the cargo. To render the owners of the cargo liable for the discharge of the cargo in a foreign port the master of the ship must shew necessity, and also must establish his inability to communicate with the owners of the cargo for the purpose of obtaining their directions: *Australian Steam Navigation Co.* v. *Morse* (7); Carver's Carriage of Goods by Sea, ss. 295, 299. The captain never communicated with the owners or consignees of the cargo. All he did was to communicate with his own agents.

(1) (1877) 3 App. Cas. 72.
(2) [1893] A. C. 56, 63.
(3) [1909] A. C. 450.
(4) (1813) 1 Dow, 336, 344, 347.
(5) (1898) 3 Com. Cas. 112.
(6) [1901] A. C. 362, at p. 366.
(7) (1872) L. R. 4 P. C. 222, 228.

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Charles Murray, K.C. (of the Scottish Bar), and *G. C. Rankin*, for the respondents. The respondents have in their favour the findings of fact on both questions in the Inner and Outer House, and the Court had the assistance of a nautical assessor who came to the conclusion that the ship was seaworthy when she left Libau. On the point that the cargo should have been brought to Leith without being discharged, the master was under a legal duty to prevent deterioration or loss of cargo. The ship was carrying a general cargo, and, not knowing the addresses of the different owners, the master communicated with the only firm which had acted for the shippers. The appellants' defence rests entirely upon the allegation that the valve box of the after feed pump cracked soon after leaving port, and on the fact of the age of the vessel. The respondents maintain that the evidence proves that there was no defect in the after feed pump when the vessel left Libau harbour. Nor was it proved that the absence of the connection of the donkey engine with the hot well rendered the vessel unseaworthy. The whole evidence must be taken into account : *Parker* v. *Potts* (1) ; *Anderson* v. *Morice* (2) ; *Pickup* v. *Thames Insurance Co.* (3) There was an independent trial of the machinery before starting from Libau, and there was nothing in the evidence to suggest that there was anything wrong with the pumps at that port, and the result of the evidence taken as a whole is that the vessel was perfectly fit and seaworthy at Libau. The respondents submit that the appellants must prove their charge of unseaworthiness and they have not done so. *The Schwan* (4), relied on by the appellants, is totally different from this case. [They also commented on *Steel* v. *State Line Steamship Co.* (5) and *The Europa.* (6)]

Horne, K.C., in reply.

The House took time for consideration.

1911. Feb. 20. LORD LOREBURN L.C. My Lords, this is a case in which both the Lord Ordinary and the Inner House, not

(1) (1815) 3 Dow, 23, 31.
(2) (1874) L. R. 10 C. P. 58, 67.
(3) (1878) 3 Q. B. D. 594, 595, 597.
(4) [1909] A. C. 450.
(5) 3 App. Cas. 72, 89.
(6) [1908] P. 84, 97.

without doubts, have held that the steamship *Tatjana* was seaworthy when she sailed from Libau on April 8, 1905, and upon that the order appealed from wholly rests. Your Lordships hesitate long before differing from any finding of fact concurred in by both Courts, and especially so when it hinges upon the credibility or effect of evidence given orally by witnesses. In the present instance nearly all the material evidence was given on commission. Still, I hesitate to differ from learned judges whose opinion carries so great an authority. I can, and do, almost entirely agree with them upon the actual facts, but I do not think that those facts point to a conclusion of seaworthiness.

If this ship was seaworthy, what occurred to her almost immediately after she left port is quite unaccountable, and it is the shipowner's business to account for it if he can in some way which shall displace the natural inference.

The *Tatjana* sailed on April 8, and within a few hours her feed pumps broke down, with the result that the boilers had to be fed with sea water by means of the donkey pump. She met with bad weather and put in at Elsinore for repairs after suffering some damage both to ship and cargo.

Manifestly, this occurrence called for explanation. In ordinary circumstances a ship which starts seaworthy on her voyage is not driven to feed her boilers with sea water in three or four hours. When the explanation given by the shipowner, who had all the information in his hands, is examined, it seems to me highly unsatisfactory. The immediate cause of the breakdown was that a pipe forming part of the valve casing of the feed pumps cracked. Was it sound when the voyage commenced? Upon that point a good deal of conflicting evidence was given. I greatly suspect that it was not sound. The Lord President found it difficult to answer this question with certainty, and his colleagues concurred in his opinion.

But assume that the pipe was sound when the ship sailed from Libau. The fracture put the after feed pump out of action. There was also a fore feed pump. Why did it not serve to feed the boilers with fresh water from the hot well? No really satisfactory answer was given. During a great part of the controversy it was asserted by the shipowner that the fracture of the pipe

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necessarily put both feed pumps out of action. Then it was discovered, or thought to be discovered, that this was not so. Upon which the owners of cargo naturally argued that, if the fore feed pump did not work properly, it must have been itself defective, and there was evidence in support of that view. No, replied the shipowner; it would have worked well enough if the engineer had put a blind flange on both the discharge and delivery side of the broken pipe, whereas he put it only on one side, for which piece of negligence the shipowner is not liable under the contract of carriage. After reading the evidence, I am not at all satisfied that the fore feed pump was in efficient order when the voyage commenced.

Let me, however, again assume that it was in good order, and that its failure to do its work was due to the negligence of the engineer. There was still a third pump, the donkey pump, which, as I understand the evidence, might have supplied the boilers from the hot well. Why did the donkey pump not do this? Here also there are contradictory statements. When the vessel was built there was a connection between the donkey pump and the hot well, which would have enabled water to be pumped from the well into the boilers, and so have dispensed with the need for salt water altogether. But it was said that the connecting pipe had been stolen while the vessel lay up at Libau. It seems to me very important to know whether the connecting pipe was there and in order. The Lord Ordinary says, "It is admitted that when the vessel started from Libau the original connection to the hot well was no longer there." The Lord President does not express any view, thinking it immaterial. It seems to me distinctly, from the evidence, that there was in fact no connection with the hot well. That might not affect the case if the two feed pumps were in good order, but it is not proved that they were so; and here is the third and last mechanism for getting fresh water into the boilers unserviceable at a crisis, like the other two, within a few hours of leaving port. Abundant suggestions and excuses are offered in each case, but no solid explanation of the surely singular occurrence that three pieces of mechanism, all asserted to have been in good condition at the commencement of the voyage, all failed to

do their duty three or four hours later. I am satisfied that the shipowner has not met the strong prima facie case of unseaworthiness that is made against him by these facts.

Let me add that other parts of the evidence confirm this view. The *Tatjana* was an old ship and had been laid up for eighteen months at least before April. She then was bought by the pursuer for little more than breaking-up value. Very little was spent upon repairs by the pursuer, and practically nothing on the engines. No proper or sufficient survey was, in my opinion, made before she sailed. These are antecedents which not only explain the existence of defects, but actually conduce to them and hinder their detection.

I think this appeal should be allowed.

My Lords, I have to say that Lord Macnaghten and Lord James of Hereford take the same view.

LORD SHAW OF DUNFERMLINE. My Lords, the appellants were holders of bills of lading for two parcels of oats, which were part of the cargo of the steamship *Tatjana*. The bills were granted on March 18, 1905, by the respondent Klein, as master of the steamship. There was no charterparty. On the margin of the bills of lading there is an exemption from liability on the part of the shipowner. This exemption covers any "act, neglect, or deviation" of the master or mariners or other servants of the shipowner.

The action has been brought to recover payment of two sums: the first, a proportion of general average, namely, the proportion of an account for the repair of the vessel at Elsinore, to which she was taken in the circumstances after mentioned; and, second, for a portion of the expenses of unshipping, drying, &c., and reshipping the grain and seed cargo while at Elsinore. These claims are resisted by the appellants, who maintain that the vessel started on her voyage in an unseaworthy condition. The voyage began on April 8, 1905, the ship being destined from Libau to Leith.

The record of the ship is briefly stated as follows. She was built in 1872. Her original class was at Lloyd's A 1. In 1884 she passed her No. 1 survey. In 1892, eight years afterwards,

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she passed survey No. 2. This survey was her last. In 1896 she was withdrawn from survey No. 3. Thereafter she exchanged hands, and there seems little doubt that in the course of years she passed, as a seagoing vessel, from bad to worse. In 1902 she obtained a certificate of the fourth class from the Germanischer Lloyd's. This certificate lasted until June, 1905, and was accordingly about to expire. At the same date—1902—she obtained a Germanischer Lloyd certificate for her machinery, the certificate prescribing, inter alia, that "the machinery and boilers are to be surveyed annually if practicable." They were, however, never again surveyed.

In the end of December, 1901, she was purchased by Russian from Spanish owners for 3000*l.*, and performed certain voyages for them at a loss until June, 1903. She was then laid up at Libau, her owners having, in the language of one witness, "sustained heavy loss, and all the capital was lost when we sold her." She appears to have remained at Libau, under an admittedly inefficient watch, till 1905, a number of articles, including "a number of copper tubes, and probably other things," having been stolen from her. At this period the vessel could not apparently be insured, the refusal of the Nadeshka Insurance Company in 1903 being proved. In April, 1905, the respondent Klein purchased the vessel for 2000*l.*—her break-up value. On the 8th of that month she put to sea. Within one-and-a-half hours of her engines putting on full speed her machinery broke down.

A fracture of the casing of the aft feed pump was observed to have occurred. The engineer reported the breakage. The engines were stopped, and after a certain time it was further reported that the repairs of the casing and the feed pump could not be effected at sea. Certain operations took place, including the putting of a blind flange on the open end of the copper pipe leading to the hot well, and the aft feed pump was put out of action. The fore feed pump, however, was left free to act. According to the evidence, it was not in a good state. Klein himself, the respondent, admits that it was "a little bit affected, a little bit of rust, I think." He denies, however, that the language of Mr. Overgaard's report, that it was badly affected, is

correct, and significantly adds, "if it were true that it was badly affected, my vessel would never have been allowed to start." One extraordinary feature of the case, however, is this: it is now admitted that the fore feed pump was not entirely put out of action, but only the aft feed pump; but in the suit as brought by the pursuer the allegation was that both pumps were put out of action. The shipowners, who ought to have known the facts, waited two years after the voyage was completed before issuing a summons, and then stated the facts erroneously and permitted a great body even of their own evidence to be taken by commission upon this erroneous footing. Now that the error stands admitted, it is difficult to know what the respondents' position as to the fore feed pump is. The best that can be said for it is, that whereas it was till a late stage in the case maintained that that pump was not acting at all after the casing break made itself manifest, it is now contended that it was acting perfectly well all the time. My Lords, I have investigated the evidence, and no doubt is left upon my mind that this contention is unsound. I think it to be quite clear that, to begin with, this vessel left harbour with her fore feed pump in a defective condition.

The ship, however, had a reserve to meet such an emergency, a reserve in accordance with sound practice in shipbuilding and with her own plans of construction. This was the donkey engine with properly appointed copper pipage connecting with the hot well. Until a late stage in the case it was maintained that that pipage was in situ; it is now admitted that it was not there at all, having probably been stolen during the imperfect watch already described. The vessel put to sea with this defect also. Within a few hours after leaving the port of Libau other serious defects became apparent. It is not, however, known whether they existed before she sailed. The shipowners' case is that everything that was wrong, except the lack of the pipage mentioned, developed or occurred one-and-a-half to two hours after the vessel started. During that period there was quiet weather.

The aft feed pump being out of action, and the vessel having started with her fore feed pump defective, and the donkey engine

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pipage to the hot well gone, the pumping power of the donkey engine had to be requisitioned somehow to assist in supplying water to the boilers, and it was set to pump salt water into them.

The vessel was plainly unfit for the voyage; and it occurred to the captain to make for Elsinore, instead of returning to Libau for repairs. She was only two or three hours from Libau. The barometer was falling, and one of the elements in determining Elsinore as the destination appears to have been that, the water of the Baltic being brackish, it was believed that the risk of pumping in sea water with the donkey engine might be run so far. Heavy weather was encountered. There was a large deck cargo. The coamings, which were of cast iron and not of malleable iron, were smashed, and other damage was done. Elsinore, however, was reached on the morning of April 11, and the accounts for repairs, shifting of the cargo, &c., were there incurred. On May 1, 1905, the *Tatjana* proceeded to Leith, which port she reached on May 4.

These facts, as above resumed, seem to be practically all that are essential for the determination of this case. I shall consider in a moment the question of onus which has played so powerful a part in the judgments of the Court below; but what, my Lords, are the probabilities which the facts raise as to where the truth of this case lies? The learned Lord Ordinary, who does not take the serious view of some of them that I do, makes an observation at the close of his own résumé, which, if I may say so, appears to me to be of much cogency: "Prima facie it would therefore not seem improbable that the engines were defective at the time when the vessel started from Libau; and that their breakdown within three hours (or one-and-a-half hours, as the second engineer says) of full speed having been got up, was attributable to this initial defect. In a question of seaworthiness due to initial defect, it is, of course, immaterial whether the defect was latent or was capable of being discovered on a careful examination of the engines. The warranty of seaworthiness is absolute unless qualified by contract between the parties; and there is nothing in the contract here which qualifies the obligation to provide a seaworthy ship."

It remains upon the narrative, however, to be said that the position of the appellants must have been to some extent prejudiced by the delay of two years which occurred between the arrival of the vessel at Leith on May 4, 1905, and the signeting of the summons in this action on May 16, 1907. Speaking for myself, I do not doubt that valuable evidence as to the state of the pipage before mentioned has, by reason of this delay, been destroyed or lost. When to this is added the pursuer's own misconception as to the nature and extent of the breakdown of machinery which had occurred, I express no surprise that there has been much difficulty in the Courts below on that subject.

My Lords, after considering and reconsidering the evidence in this case, I am of opinion that the *Tatjana* was unseaworthy when she left port. The probabilities alluded to by the Lord Ordinary are that that is the fact; but I feel also entirely satisfied that that fact has been proved.

In view, however, of the frequent references to the burden of proof, and to the manner in which, and the standpoint from which, the evidence in this case has been examined by the learned judges of both Houses of the Court below, I think it right to state what I hold to be the well-established rules bearing on those topics in cases like the present.

My Lords, in the judgments stress is repeatedly laid upon the fact that the onus of proving unseaworthiness is upon those who allege it. This is, of course, a sound doctrine; and it is none the less sound although the vessel break down or sink shortly after putting to sea. That is the principle of law. But the enunciation of that proposition does not impair or alter certain presumptions of fact, such presumptions, for instance, as those which arise from the age, the low classing, or non-classing, the non-survey of ship or machinery, the refusal to insure, the laying up, the admitted defects, and generally the poor and worsening record of the vessel, together with finally the breakdown, say, of the machinery, immediately, or almost immediately, on the ship putting to sea. It would be a very curious, and, in my opinion, an unreasonable and dangerous, thing if circumstances like these did not raise presumptions to which, especially taken cumulatively, effect were not to be given in Courts of law.

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The last circumstance mentioned is a very familiar example. In the language of Lord Redesdale in *Watson* v. *Clark* (1), decided nearly a century ago, " He had always understood it to be a clear and distinct rule of law that if a vessel in a short time after leaving the port where the voyage commenced was obliged to return, the presumption was that she had not been seaworthy when the voyage began, and that the onus probandi was in such cases thrown upon the assured."

Lord Eldon, in the same case, was even more emphatic (2) : " When the inability of the ship to perform the voyage became evident in a short time from the commencement of the risk, the presumption was that it was from causes existing before her setting sail on her intended voyage, and that the ship was then ' not seaworthy,' and the onus probandi in such a case rested with the assured to shew that the inability arose from causes subsequent to the commencement of the voyage."

My Lords, in view of the manner in which the evidence in this case has been regarded in the Court below, I think it right to give the distinction between the proposition in law that those alleging unseaworthiness have the burden of proof of that, and the presumptions arising on facts. And I do so in the language of Brett L.J. in *Pickup* v. *Thames Insurance Co.* (3) : " A good deal has been said on the argument about the ' burden of proof ' and ' presumption.' The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant, and so far as the pleadings go it never shifts ; it always remains upon him. But when facts are given in evidence it is often said certain presumptions, which are really inferences of fact, arise and cause the burden of proof to shift, and so they do, as a matter of reasoning and as a matter of fact ; for instance, where a ship sails from a port, and soon after she has sailed sinks to the bottom of the sea, and there is nothing in the weather to account for such a disaster, it is a reasonable presumption to be made that she was unseaworthy when she started."

(1) 1 Dow, 336, 348. (2) Ibid. at p. 344.
(3) 3 Q. B. D. 594, 599.

The same proposition was laid down by Lord Lindley in *Ajum Goolam Hossen & Co.* (1) In short, the whole evidence in the case must be weighed, and when those alleging unseaworthiness prove a mass of facts such as I have mentioned, and such as appear in this case bearing upon the record of a vessel which founders or breaks down shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may of course be overborne by proof that the loss or damage to the vessel occurred from a cause or causes of a different character. My Lords, I venture humbly to think that had due effect been given to the above-mentioned principles, certain of the difficulties which appeared to the learned judges below would have been found less formidable, and that the review of the evidence would have resulted in a verdict for the defenders.

But, my Lords, apart from this, I do not find myself able to agree with certain conclusions and observations on the evidence which I will now briefly notice. The Lord Ordinary, after alluding to what was called a "survey" prior to sailing, holds that it "was reasonably sufficient for the purpose for which it was made." His Lordship adds, "No defects of any kind were discovered; but I cannot affirm that the survey was of such a kind that a crack or other flaw in the valve casing of the feed pipes would be likely to be detected." The point as to the now admitted actual absence of the copper tubing from the donkey engine to the hot well is not observed upon in this part of the judgment. In a later portion thereof, however, "it is admitted that when the vessel started from Libau the original connection to the hot well was no longer there, and that in ships of modern build such a connection is always provided." It seems difficult to understand how a survey could be considered sufficient for its purpose without such a manifest and serious defect having been noted. I am of opinion that this "survey"—it was conducted by the defenders' servants—was imperfect, useless, and indeed, as a survey, unreal. Whereas the whole history of this vessel demanded that the survey should have been entirely independent, and of the most thorough and searching character.

(1) [1901] A. C. 362, 366.

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The learned Lord Ordinary holds that this vessel left Libau in a seaworthy condition. Two passages from his judgment will illustrate his view: "The defenders' argument raises the question whether the steamer can be regarded as unseaworthy for a voyage of five days' duration because one of her feed pumps is out of order, there being another which was sufficient to supply all the necessary water for the boilers, in addition to the reserve supply obtainable by means of the donkey engine."

My Lords, for the reasons stated, I think that the other feed pump, referred to by the Lord Ordinary as sufficient, was not so; and I hold that to be plainly admitted by Klein, the respondent, himself. So far as supplying "all the necessary water for the boilers" is concerned, it appears to me to be plain that the donkey engine was requisitioned for the sole and simple reason that the fore feed pump was insufficient to supply all the necessary water. In the next place, as to the reserve supply, which, owing to the defects in the donkey engine pipage, could not be from fresh water or the hot well, the learned Lord Ordinary thus treats that subject: "It is admitted that when the vessel started from Libau the original connection to the hot well was no longer there, and that in ships of modern build such a connection is always provided. This, no doubt, is a wise precaution in the event of both the feed pumps becoming disabled, but I think it impossible to affirm that a vessel which has two pumps in good order, either of which is sufficient to supply her boilers with fresh water, is unseaworthy because she has not got a third means of providing a fresh water supply."

Your Lordships are in possession of my view (differing from that of the Lord Ordinary) as to the pumps. But, my Lords, I should reckon, even on the assumptions of fact which were made by the Lord Ordinary, that his conclusion is far from satisfactory. The donkey engine pipes connecting with the hot well made that whole apparatus what it was designed,—and no doubt most properly designed,—to be, namely, an emergency apparatus. Not only is it drawn as such, but it was actually constructed according to these plans. The emergency occurred and the occasion when the apparatus was needed arose, but it was found that this vessel

had left on a voyage across the North Sea without it. It appears to me plain that such a vessel cannot be pronounced seaworthy.

When the case reached the Inner House, great difficulty appears to have been experienced by the learned judges of the First Division. The learned Lord President, dealing with the point as to the break in the pump casing, thinks that "it is difficult to say that the onus of fixing that the crack or weakness existed at the start has been discharged." This is precisely one of the difficulties which I incline to think is removed, and most reasonably and properly removed, by the considerations and authorities to which I have referred. As to the point in the Lord Ordinary's judgment just mentioned, namely, the condition of the donkey engine pump and the want of pipage connecting with the hot well, quite a different ground is taken from that adopted in the Outer House. The Lord Ordinary's view appears to have amounted to an affirmation that although this connection, originally designed and highly useful and necessary, was awanting, the vessel was seaworthy. This view is not affirmed in the Inner House, as I am glad to recognize. On the contrary, however, a view wholly unsupported by the evidence, and upon which neither party seems to have relied in argument,—a view of fact—is stated thus: "The fact is certain that the donkey had a nozzle connection, fit and proper for connection with the hot well, and even if the copper connection pipe were gone, nothing would have been simpler than to have substituted for it an ordinary piece of hose, which, as the pipe was purely for suction, and had no pressure, would have acted perfectly well. I therefore come to the conclusion that de facto the unseaworthiness of the ship was due solely to the fault of Lange."

Lange was the first engineer, and, whether this theory be accurate or not, it was certainly never put to him. Nor was it suggested or submitted to anybody else. Nor was it proved that there was hose available and suitable. I express no opinion upon the point, although I can conceive considerable differences among practical men as to the feasibility of the suggestion. But, my Lords, the first real objection to the view is that it is not a view

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arising out of proved facts, but a suggestion of experiment and expediency, as to the adequacy of which there is no evidence. But, in the second place, my Lords, I should reckon it to be accompanied with much danger to life and property at sea, if, on the assumption of essential parts of the machinery being wanting, the ship should nevertheless be held to be constructively seaworthy, because, by some ingenuity of contrivance, it might have been possible (if, in the emergency, it had occurréd to the engineers to think of it) to put together some apparatus to take the place of the missing parts of the machinery. It might, no doubt, sometimes be the case that slight defects occurring or discovered would suggest, in the practical management of a vessel, ordinary and easily adopted remedies; but it would, according to my humble view, be necessary in such cases to submit the suggestions to the test of approval or scrutiny by evidence. In the absence of such evidence, what has to be relied upon here is that which is at the foundation of the whole story, namely, that the vessel put to sea lacking essential portions of her machinery or equipment.

Lords Kinnear and Dundas did not deliver separate judgments, but concurred in the Lord President's judgment. For the reasons above indicated, and after much anxious consideration, I have felt compelled to come to a different conclusion.

I do not resume the strikingly bad record of the vessel or the suddenness of the breakdown when she was again put afloat. But in my humble judgment, my Lords, it would be difficult to figure a case in which the presumption against the seaworthiness of a ship was stronger. It would be sufficient for me to observe that I do not think this presumption has been overcome. But, on the contrary, I think that the inference of unseaworthiness, from all the evidence led, is inevitable.

My Lords, subsidiary questions were raised in this case—one of some importance—as to whether, in any view, the unshipping, drying, and reshipping of the cargo at Elsinore were charges which could fall upon the owners of the cargo, these owners not having been asked for their authority to the operation. In the view which I have taken it is unnecessary to enter upon such questions, as I hold that the *Tatjana* was not in a condition in

which her owners should have accepted a contract for carriage of cargo, or permitted the vessel afloat. H. L. (Sc.) 1911 LINDSAY v. KLEIN. THE TATJANA.

Ordered that the interlocutors appealed from be reversed, and that the respondents pay to the appellants their expenses here and below.

Lords' Journals, February 20, 1911.

Agents for appellants: *William A. Crump & Son, for Boyd, Jameson & Young, W.S., Leith, Edinburgh.*

Agents for respondents: *Botterell & Roche, for Beveridge, Sutherland & Smith, S.S.C., Leith, Edinburgh.*

[HOUSE OF LORDS.]

THE CORPORATION OF GLASGOW . . . APPELLANTS; H. L. (Sc.) 1911 *March* 16.

AND

MRS. ESTHER LORIMER (OR RIDDELL). RESPONDENT.

Master and Servant—Slander—Liability of Master for Slander uttered by Servant—Relevancy of Averments.

In an action of damages for slander against a municipal corporation, the pursuer averred that one Gilmour, who was in the service of the defenders as a tax collector, and whose duties included the collection of the police assessments payable by the pursuer's husband and the granting of receipts therefor and for instalments thereof, while in the exercise of his duty as police tax collector in the employment of the defenders called at the pursuer's house and demanded payment of the police taxes. The pursuer tendered the balance due, which Gilmour declined to accept as correct and asked to see the receipts for previous payments, and then left the house. That when he did call again on the same day he accused the pursuer of having altered a receipt for 7*s.* 6*d.* from the sum of 4*s.* 6*d.*, for which it had been truly made out, for the purpose of defrauding the defenders of the sum of 3*s.*; that the receipt bore no marks of having been altered; that when she denied the charge Gilmour became violent and threatened to lodge information with the police authorities which would result in her being put in gaol for three months for forgery; and that he repeated the slander in the house of a neighbour:—

Held, reversing the decision of the Second Division of the Court of

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Session, that the averments disclosed no ground of action against the defenders, for there was nothing on the face of them to shew expressly or by implication that the expression of any opinion by Gilmour as to the genuineness of any receipt which might be produced to him for payment of taxes was within the scope of his employment.

APPEAL from interlocutors of the Lord Ordinary (Lord Salvesen) and the Second Division of the Court of Session, Scotland (1), approving of certain issues for the trial by jury of an action of damages at the instance of the pursuer, Mrs. Esther Lorimer or Riddell, against the defenders, the Corporation of Glasgow, in respect of alleged verbal slanders stated to have been uttered concerning the pursuer by one Matthew Gilmour, a sheriff-officer employed by the defenders in collecting rates.

The pursuer averred that, in conformity with the practice in Glasgow, the said assessments were accepted by the defenders in instalments; that on or about September 28, 1909, the following sums had been paid: 7*s.* 6*d.*, 4*s.*, 2*s.* 6*d.*, and 2*s.*, leaving a balance due of 1*s.* 0½*d.*

In condescendence 3 the pursuer averred: That Matthew Gilmour, who was in the service of the defenders as a tax collector, and whose duties included the collection of the police assessments payable by the pursuer's husband and the granting of receipts therefor and for instalments thereof, while in the exercise of his duty as police tax collector in the employment of the defenders called twice at pursuer's house; that on the first occasion Matthew Gilmour came to the pursuer's house and demanded payment of the police taxes; that pursuer's husband was absent at work, but the pursuer, who was alone in the house at the time, tendered to Gilmour the sum of 1*s.* 0½*d.*, being the balance due by her husband; that Gilmour declined to accept said sum and stated that there was due to the defenders from the pursuer's husband the sum of 4*s.* 0½*d.*; that Gilmour thereupon demanded production of all the receipts for police taxes for the current year; that the pursuer immediately produced four receipts making a total of 16*s.* which she had on various dates paid to the collector Gilmour, which clearly shewed that there only remained a balance of 1*s.* 0½*d.* due to the defenders, and handed the same to Gilmour

(1) 1910 S. C. 693.

for examination; that upon examining the receipts Gilmour remarked that he would call again the same afternoon, and left the pursuer's house.

Condescendence 4: That about 3 P.M. on the said date Matthew Gilmour again called at the pursuer's house and again requested the pursuer to produce to him the four receipts which she had exhibited to him on the morning of the said date. The receipts were accordingly produced. Among these receipts was one for 7*s*. 6*d*. That the said receipt presented no appearance of having been altered, but nevertheless Matthew Gilmour accused the pursuer of altering and forging the said receipt for 7*s*. 6*d*. from the sum of 4*s*. 6*d*. to 7*s*. 6*d*. for the purpose of defrauding the defenders of the sum of 3*s*.; that he further stated that he would lodge information with the police authorities which would result in the pursuer being put into gaol for three months for forgery; that pursuer demanded that Gilmour should immediately hand her back the said receipts for 7*s*. 6*d*., fearing that Gilmour would destroy the same, and she indignantly repudiated the suggestion that she had acted dishonestly, and she threatened to report Gilmour at the office of the defenders for his conduct; that Gilmour thereupon violently caught hold of the pursuer, pulled and pushed her about, and attempted to forcibly take possession of the remaining receipts which she held in her hand; that as pursuer endeavoured to retain possession of the said receipts, Gilmour caught hold of one or more of the said receipts, and some were partly torn; that the pursuer, fearing further violence at the hands of Gilmour, shouted loudly for help in the hope that some of the neighbours in the adjoining houses would come to her assistance; that Gilmour, becoming alarmed, left the pursuer's house, but the pursuer followed him down the common stair of the tenement.

Condescendence 5: That the pursuer entered the house within the said tenement occupied by a Mrs. Johnston, and that she was followed into the said house by Gilmour, who repeated the said allegations against her in the presence and hearing of Mrs. Johnston, and falsely and calumniously stated of and concerning the pursuer in her hearing and in the presence and hearing of Mrs. Johnston that she, the pursuer, had altered and

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forged the said receipt from the sum of 4*s.* 6*d.* to 7*s.* 6*d.*, having put "a tail upon the figure 4, making it into a 7," and had thereby attempted to defraud the defenders of the sum of 3*s.*, and that she was liable to be put into gaol for three months for forgery; that the pursuer indignantly repudiated the allegations of Gilmour, who repeated the same several times in the presence of Mrs. Johnston.

The Court of Session having decided(1) that the averments were relevant, the defenders appealed.

March 16. *J. A. Clyde, K.C.*, and *M. P. Fraser* (both of the Scottish Bar), for the appellants. The appellants are not liable for the verbal slander uttered by Gilmour. A corporation is not liable for words spoken by a servant beyond the scope of his employment: *Citizens' Life Assurance Co.* v. *Brown* (2), where the question turned on the responsibility placed on the servant by the corporation; see also *Agnew* v. *British Legal Life Assurance Co.* (3); *Beaton* v. *Corporation of Glasgow.* (4) Here Gilmour's only duty was to collect the taxes which were due, to go and examine his superiors' books, or, if necessary, to put the warrant into force. He had no duty to express his own opinion as to the genuineness of any receipt shewn to him. *Finburgh* v. *Moss Empires, Limited* (5) was the first case in Scotland where a company was held liable for verbal slanders on the part of its servants; but that case was very different from this, for there the servants were acting in the execution of a by-law of the company. Other cases illustrating the point are *Cameron* v. *Yeats* (6); *Eprile* v. *Caledonian Ry. Co.* (7); *Nicklas* v. *New Popular Café Co.* (8); *M'Adam* v. *City and Suburban Dairies.* (9) In *Ellis* v. *National Free Labour Association* (10) there were no special instructions to the man accused of the libel, but he was in a high grade of authority, and there the association was held responsible for the manner in which he carried out his duty. The question is always what was the

(1) 1910 S. C. 693.
(2) [1904] A. C. 423.
(3) (1906) 8 F. 422.
(4) 1908 S. C. 1010.
(5) 1908 S. C. 928.
(6) (1899) 1 F. 456.
(7) (1898) 6 Scots L. T. 65.
(8) (1908) 15 Scots L. T. 735.
(9) (1911) 48 Sc. L. R. 318.
(10) (1905) 7 F. 629.

nature of the employment of the servant who uttered the slander? Here there was no averment that what Gilmour did was within the scope of his authority as a servant of the appellants.

Crabb Watt, K.C., and *J. A. Christie* (both of the Scottish Bar) (with them *Barrington-Ward*), for the respondent. This is a case of relevancy, and the actual facts must be taken to be that Gilmour came to the respondent's house twice. On both occasions he had seen the receipts, therefore he had some chance of verifying their accuracy. When a servant is averred to have done some act within or connected with the employer's business the employer is liable: *Mackay* v. *Commercial Bank of New Brunswick*. (1) It is not necessary to aver or prove actual authority express or implied from the master for the particular act done. The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master is proved: Willes J. in *Barwick* v. *English Stock Bank* (2) and Lord Lindley in *Citizens' Life Assurance Co.* v. *Brown*. (3) Gilmour had authority to express his opinion. If the pursuer avers that the slander was uttered within the sphere or scope of the servant's employment or for the master's benefit she is entitled to an issue, and it will be for the jury to say whether the act complained of fell within such a sphere or scope or whether it was one for which the master is not responsible. Here Gilmour after examining the receipts returned to the office, and this seems to shew that what he said was within his duty. In *Dyer* v. *Munday* (4) the "scope of authority" and "course of employment" were said to be equivalent terms. What Lord M'Laren said in *Ellis* v. *National Free Labour Association* (5) does not agree with what his Lordship said the next year in *Agnew* v. *British Legal Life Assurance Co.* (6) In *Mackenzie* v. *Cluny Hill Hydropathic Co.* (7), although the defenders pleaded that the servant was not acting

(1) (1874) L. R. 5 P. C. 394.
(2) (1867) L. R. 2 Ex. 259, 265.
(3) [1904] A. C. 423, 427, 428.
(4) [1895] 1 Q. B. 742, 748.
(5) (1905) 7 F. 629, 633.
(6) (1906) 8 F. 422, 429.
(7) 1908 S. C. 200.

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within the scope of his employment, the Inner House allowed an issue. The respondent relies on the three cases of *Mackay* (1), *Barwick* (2), and *Citizens' Life Assurance Co.* (3); for Gilmour was at the respondent's house for the purpose of putting this money, when he got it, into his master's pocket. Therefore his acts were authorized by his employer, and the pleadings do contain matter which ought to be put in issue.

No reply was asked for.

LORD LOREBURN L.C. My Lords, this is an action for slander against the Corporation of Glasgow in respect of certain utterances on the part of a person in their employment; and I take his position as it is stated in the third condescendence, that he "was in the service of the" corporation "as a tax collector" and his "duties included the collection of the police assessments payable by the pursuer's husband and the granting of receipts therefor." That was his position; and his authority was to go to the house where these people resided for the purpose of discharging those duties. While there he seems to have made a charge of forgery against the wife of the ratepayer. The point is whether or not the Corporation of Glasgow are liable in damages for that slander.

I do not think the principle is really in dispute. If it was within the scope of his authority to make a statement on behalf of his principals for their benefit, then the principals are liable for utterances in the course of making that statement.

Now in this case the duty of this tax collector has already been specified and is to be taken as contained in the third condescendence. In the course of it he would have to ascertain what were the credits to which the ratepayer was entitled as against the assessments that had been made upon him. Had this collector, then, a right, or rather was it within the scope of his authority as I have described it, to express his own opinion as to the falsity or genuineness of any receipt; or, indeed, was it within the scope of his authority to make any statement or comment at all? I think he had no such implied authority,

(1) L. R. 5 P. C. 394. (2) L. R. 2 Ex. 259, 265.
(3) [1904] A. C. 423, 427, 428.

because I cannot see why his opinion needed to be communicated, or in what way it could be a benefit to the corporation to communicate his opinion. He might indeed act upon the belief that the credit was a just one, or upon the belief that the credit was not a true credit; and then he might enforce or not enforce, I suppose at the peril of his employers, the warrant of the sheriff; or he might suspend enforcement and ascertain the truth. But I do not see that he had any authority to express an opinion. I do not think it is good law to say that the corporation is bound by anything said by one of its servants which is connected with the business of that servant. The question is whether or not there is any authority to communicate on behalf of the corporation any comment or statement of opinion at all.

My Lords, I will only further say that, in my view, decided cases are chiefly valuable when they establish a principle. Where they do not establish a principle, but merely record the application of a principle to a particular set of facts, they may be instructive as to the point of view from which the judge regards the facts; but they are of little importance from any other point of view.

LORD KINNEAR. My Lords, I am entirely of the same opinion.

LORD ATKINSON. My Lords, I concur shortly on these grounds: that there is nothing, in my opinion, on the face of the pleadings to shew expressly or by implication that Gilmour was clothed with authority to express on behalf of the corporation to ratepayers any opinion he might form on the genuineness of any receipts which might be produced to him for payment of rates; that it was not shewn by the pursuer's pleadings, as I think it should be, that the expression of such an opinion was within the scope of Gilmour's employment, from which it follows, on the authorities, that the corporation are not responsible for a slander uttered by him in the expression of that opinion.

LORD SHAW OF DUNFERMLINE. My Lords, the learned Lord Ordinary in this case says: "It is not suggested by the

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defenders that Gilmour was endeavouring to collect the extra three shillings in order that he might put the money in his own pocket and so defraud the defenders; but if not, then what he did" (adds the learned judge) "was plainly within the scope of his employment." This is an action for slander; and, for myself, I fail to find any countenance in the case for the proposition that slander was either on instructions or of necessity part of the task of "endeavouring to collect" certain rates.

My Lords, in order to see what actually was the scope of his employment one must refer, as my noble and learned friend on the woolsack has done, to the early part of condescendence 3. The scope of his employment is thus defined: that Gilmour's "duties included the collection of the police assessments payable by the pursuer's husband and the granting of receipts therefor." It is perfectly true that it was part of Gilmour's duty to look at the receipts given for payments formerly made; but I entirely agree with my noble and learned friends who have preceded me that it was no part of his duty to express his own opinion as to the genuineness of such documents. This is only a euphemistic way of saying that it was not within the scope of his duty to slander the producers of such documents or to allege that those documents were forged or altered by them.

My Lords, there is nothing in this record to suggest that it was within the scope of his employment to do anything else than what according to the averment of the corporation he did do, namely, report the occurrence to his superiors and inspect their books. If, however, it were to be held that persons in the ordinary and comparatively humble position of this officer were within the scope of their employment in expressing opinions as to the conduct of those with whom they have dealings in the course of doing their work, the consequences might be of the most serious character, and the essential justice which underlies the maxim qui facit per alium facit per se would disappear. In my opinion that maxim does not apply; and responsibility for the servant's alleged slander does not attach to the employer.

In the old-fashioned phrase,—and the good phrase,—adopted in Scottish pleading, I am of opinion that this record contains no issuable matter.

Ordered: That the interlocutors appealed from be reversed, and that the respondent do pay to the appellants their costs here and below. Further ordered: That the respondent do repay to the appellants any expenses paid by them to the respondent.

Lords' Journals, March 16, 1911.

Agents for appellants: *Martin & Co., for A. W. Myles, Town Clerk, Glasgow, and Campbell & Smith, S.S.C., Edinburgh.*

Agents for respondent: *Warlow & Patey, for E. Rolland M'Nab, S.S.C., Edinburgh, and M'Dougall, Macmillan & Co., Glasgow.*

[HOUSE OF LORDS.]

JAMES C. PITMAN (Curator) . . . . . Appellant;

AND

ALEXANDER CRUM EWING and Others . Respondents.

Succession—Election—Approbate and Reprobate—Invalid Exercise of Power of Appointment—Conditions of Acceptance of Legacies.

It is the law of Scotland as of England that no person can accept and reject the same instrument. Where therefore a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them.

A testator gave the life rent of a fund to his daughter and the fee to her children "in such proportions . . . . and subject to such restrictions provisions and limitations as she may direct" and failing such directions then equally among them. The daughter by one comprehensive trust disposition and settlement which was not a good exercise of the power of appointment gave the fund massed with her own estate to her children in life rent and to their children in fee:—

Held, reversing the decision of the First Division of the Court of

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Session, that the children of the daughter claiming the fund in default of appointment must be put to their election between their own rights and the benefits conferred on them by the will, as they could not accept part and reject part of the same will.

APPEAL from part of a decision of the First Division of the Court of Session, Scotland, upon a special case. (1)

The question raised in this appeal was whether the Scottish doctrine of approbate and reprobate (equivalent in England to the doctrine of election) applied to the testatrix Mrs. Bayly's estate. The material clauses and facts are given fully in the opinion of Lord Shaw of Dunfermline. It need only be further stated that the appellant, James C. Pitman, advocate, was appointed by the Court of Session to protect the interests of certain minor grandchildren who were included amongst the fifth parties in the special case. And by interlocutor dated July 20, 1910, the curator was put in funds to take this appeal to the House of Lords.

Mrs. Bayly, the testatrix, left four children, all married. The only son of Mrs. Bayly was the party of the third part, and he abides by his mother's settlement; the three daughters of the marriage with their respective husbands were the parties of the fourth part. The third party had no children. The whole minor children of the fourth part were parties of the fifth part.

The respondents who presented the respondents' case to this House were all those who appeared as parties of the fourth part with the exception of one, who had died, and her executors who had been substituted. One of the children of the fifth part had attained majority and acquiesced in the judgment appealed from. The special case was submitted at the instance of the trustees of the late Mr. Humphry Ewing Crum Ewing, and the question had reference to the effect of a professed exercise by the late Mrs. Bayly, a daughter of Mr. Humphry Ewing Crum Ewing, and the mother of the respondents, of a power of appointment over the capital sum of one third share of the residue of Mr. Crum Ewing's estate of which he gave her the life interest and directed her to appoint the capital among her children. If there was no appointment the estate was to go to Mrs. Bayly's children equally.

(1) 1910 S. C. 484.

The judges in the Court of Session unanimously held that so far as the clause in question in Mrs. Bayly's trust disposition and settlement professed to be an exercise of the power of appointment it was invalid, and the appellant acquiesced in that finding. The only question therefore raised by this appeal was whether the objects of the power (that is, Mrs. Bayly's children) by repudiating Mrs. Bayly's professed exercise of it were deprived of any right to benefit under the other provisions in their favour in her trust disposition and settlement, or, as the question was put in the special case,

"(5.) In the event of it being held that the children of Mrs. Bayly are entitled to immediate payment of the fee of the said one third share of residue:

"(*a*) Are the said children as a condition of enjoying any further provisions under the trust disposition and settlement of Mrs. Bayly bound to renounce the said rights of fee" (in their grandfather's estate) "and to accept in lieu thereof rights restricted to life rents in the proportions and subject to the conditions set forth in the said disposition and settlement."

On January 28, 1910, the First Division of the Court of Session, the Lord President (Lord Dunedin) and Lord Kinnear (dissenting Lord Johnston), pronounced an interlocutor, holding that no question of election arose, and that Mrs. Bayly's children were entitled to immediate payment of the capital of the said one third share of residue (the subject of appointment) equally among them, and were likewise entitled to enjoy the provisions conceived in their favour by Mrs. Bayly out of her own estate.

1910. Dec. 7, 8. *Macmillan* (of the Scottish Bar), for the appellant. This appeal is brought on behalf of certain minor children (grandchildren of Mrs. Bayly). Mrs. Bayly's settlement disposed of her own estate and purported to exercise a power of appointment under her father's will, and under her ante-nuptial marriage contract. All parties agree that this was a bad exercise of the power of appointment, for she appointed the fee to persons who were not entitled to it. In such a case election is imposed upon the objects of a power who are also beneficiaries under the will of the donee

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of the power. In *Whistler* v. *Webster* (1) Sir Richard Arden M.R. said: "The question is very short; whether the doctrine laid down in *Noys* v. *Mordaunt* (2) and *Streatfield* v. *Streatfield* (3) has established this broad principle: that no man shall claim any benefit under a will without conforming, as far as he is able, and giving effect, to everything contained in it, whereby any disposition is made shewing an intention that such a thing shall take place; without reference to the circumstance whether the testator had any knowledge of the extent of his power or not. Nothing can be more dangerous than to speculate upon what he would have done if he had known one thing or another. It is enough for me to say he had such intention; and I will not speculate upon what he would have intended in different cases put. . . . . If the instrument is such as to indicate what the intention was, the only question, I will ask, is, did he intend the property to go in such a manner? I will not ask, whether he had power to do so; and whether he would have done it if he had known, he could not without a condition imposed upon another person. Whether he thought he had the right, or, knowing the extent of his authority, intended by an arbitrary exertion of power to exceed it, no person taking under the will shall disappoint it." The case made by the respondents is that they can take what the will could give them; but the appellant submits that Mrs. Bayly's settlement raises a question of election owing to the way in which she has dealt with the whole estate, and in the circumstances of the case Mrs. Bayly's children are put to their election between approbating her trust disposition and settlement to its full effect and forfeiting all benefits thereunder.

The judgment of Lord Johnston (4) puts the appellant's case fully. What must be implied from Mrs. Bayly's settlement is her intention that if the children took their grandfather's one third share of residue out of the general estate she would not give them anything, for her own estate would be required for equitable compensation to her grandchildren. The doctrine laid down in *Whistler* v. *Webster* (1) was accepted in English

(1) (1794) 2 Ves. Jr. 366a.
(2) 1706) 2 Vern. 581.
(3) (1735) For. 176.
(4) 1910 S. C. 484, at p. 492.

Courts and has been referred to in *Ker* v. *Wauchope* (1); that doctrine is that where a testator makes a will settling property and conferring benefits on a beneficiary, then if it is discovered by the beneficiary that the fund left is composed of two estates, one of which the testator had not the power to dispose of, but in which the beneficiary had some interest, the beneficiary is not entitled at one and the same time to claim a benefit from the testator in the fund which the testator had in his own right and at the same time claim a benefit in the fund over which the testator had not a complete right. That doctrine has also been adopted in Scotland : see the leading case of *Bonhotes* v. *Mitchell's Trustees* (2), and the dicta in *Douglas' Trustees* v. *Douglas* (3); *M'Donald* v. *M'Donald* (4); Bell's Com., 7th ed. vol. 1, pp. 141, 142, 144. See also Fry L.J. in *White* v. *White*. (5) The appellant accepts the onus of shewing that the doctrine of election applies and maintains that Mrs. Bayly's settlement raises the question of election owing to the way in which she dealt with the universitas of her estate. As to costs, they should be paid out of the general estate.

Blackburn, K.C. (with him *Leadbitter*) (both of the Scottish Bar), for the respondents. The object in both England and Scotland is to arrive at the intention of the testator. Did he intend to put the donee to his election? In this respect the Scottish law differs from the law of England—Ersk. Inst. 3 : 9 : 10 —and this difference is traceable to the Roman law—Inst. of Justinian 2 : 20 : 4—on which the Scots law of approbate and reprobate is founded. According to the law of Scotland a beneficiary is not put to his election unless the testator has made it a condition expressed or clearly implied. The rule in Scotland is first to ask, Did the testator think he was dealing with his own property? Where it does not appear that the testator knew he was dealing with property not his own, the House cannot say that he intended to put the parties to their election. Lord Kinnear thus states the distinction : " The question must

(1) (1819) 1 Bli. 1.
(2) (1885) 12 R. 984.
(3) (1862) 24 D. 1191.
(4) (1876) 4 R. 45.
(5) (1882) 22 Ch. D. 555, 559.

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always come to depend upon the intention expressed in the deed itself, and it is an element of material importance to consider whether the testator whose deed is in question was, or was not, aware that he was exercising a power which had not really been committed to him." (1) To raise an implied condition and put the party to his election the intention of the testator must be "clear beyond all doubt." It has always been laid down that the knowledge of a testator is of importance in deciding whether the testator intended to put the beneficiary to election: see Lord Cuninghame in *Nisbet's Trustees* v. *Nisbet* (2); Lord Cowan in *Douglas' Trustees* v. *Douglas* (3); Lord Curriehill in *M'Donald* v. *M'Donald* (4); Lord Adam in *Matthews Duncan's Trustees* v. *Matthews Duncan* (5); and M'Laren on Wills, 3rd ed. vol. 1, p. 252. Lord Kinnear (1) refers to *M'Donald* v. *M'Donald* (4) as establishing the proposition that all turns on the knowledge of the testator. That onus the appellant cannot discharge. There is no suggestion in Mrs. Bayly's settlement, nor can it be implied, that she was making what she knew to be an invalid appointment of her father's funds. On the contrary, the terms of her settlement clearly shew that she believed she was exercising the power conferred upon her in a competent manner. It is a question whether the House should apply the English rule to Scottish law where another rule has been applied in Scotland, but there is enough in the deed here to shew that the parties were not intended to be put to their election. Reading the settlement as a whole, the presumption is against election. Mrs. Bayly must have known that her children were entitled to legitim. An intention to put to election cannot be presumed unless some benefit is conferred on the beneficiaries by the parties putting them to their election. The funds under her father's settlement over which the testatrix had power amounted to about 20,000*l.*, and she had property of her own of 10,000*l.*, and under her ante-nuptial marriage contract 2000*l.* The children had an undoubted right to legitim on behalf of her 10,000*l.* and an

(1) 1910 S. C. 484, at p. 496.
(2) (1851) 14 D. 145, at p. 149.
(3) 24 D. 1191, at p. 1202.
(4) 4 R. 45, at p. 52.
(5) (1901) 3 F. 533, at p. 540.

indefeasible right to the 20,000*l.*, and also a right to the marriage contract fund. So all she had to deal with was 5000*l.*; and it was suggested by the appellant that she offered her children an alimentary life rent right to the whole fund upon their giving up about 27,000*l.* It is an unnatural assumption that a mother intended to disinherit her children from all participation in her estate unless they consented to an invalid restriction of their rights in their grandfather's succession. The respondents' contention is that the deed shews that Mrs. Bayly did not know that she was exceeding her power. Further, there is an express provision in Mrs. Bayly's settlement which negatives the presumption that she intended to put her children to their election in regard to their interest in their grandfather's estate. She expressly put them to their election with regard to their interest in her own estate of 10,000*l.*, and under her marriage contract by declaring that the provisions conceived in their favour were to be "in lieu and full satisfaction" of all claims competent to them against her estate and under her ante-nuptial contract. And by excluding from that declaration all reference to their grandfather's estate it must be presumed that she did not intend to put them to their election with regard to that estate. The rule in *Whistler* v. *Webster* (1) is an artificial rule and has never applied to Scotland.

[LORD MACNAGHTEN referred to Lord Robertson in *Douglas-Menzies* v. *Umphelby*. (2)]

The law of the two countries is the same up to a point, namely, that it is against equity that any man should take against a man's will and also under it, but in Scotland he is never put to an election unless the testator says You are to elect.

[LORD LOREBURN L.C. referred to Earl Cairns in *Codrington* v. *Codrington*. (3)]

The benefit the respondents were taking was not a benefit under Mrs. Bayly's will, but under that of another person, namely, their grandfather.

[LORD LOREBURN L.C. In *M'Donald* v. *M'Donald* (4) Lord

(1) 2 Ves. Jr. 366a.
(2) [1908] A. C. 224, at p. 232. The passage is given post, p. 229.
(3) (1875) L. R. 7 H. L. 854, 861; see post, p. 228.
(4) 4 R. 45, 52.

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Curriehill was laying down the whole law of England and Scotland on election and approbate and reprobate, and he was entirely wrong as to English law.]

Another exception in English law is that if the fund is given as an alimentary provision, then it is not election, for there is nothing out of which the beneficiary can give satisfaction. If the House is going to apply *Whistler* v. *Webster* (1) to Scotland, it also must apply *In re Wheatley* (2) and *In re Vardon's Trusts* (3) to Scotland, for all Mrs. Bayly's daughters are married and have nothing but an alimentary provision, and therefore have nothing out of which they can give compensation to beneficiaries who are disappointed. They are therefore not bound to elect. [He also referred to Jarman on Wills, 5th ed., p. 434, and Lord Hardwicke in *East* v. *Cook*. (4)]

Macmillan in reply. *Douglas' Trustees* v. *Douglas* (5) and *M'Donald* v. *M'Donald* (6) do not apply, for they do not decide the question before the House. In the latter case Lord Neaves said: "It seems a complete answer to any plea of approbate and reprobate or of election that the defender was never put to any election by his parents"—that he had, in fact, no "true choice or option." The equity is that a choice must be given. The intention is clearly expressed in Mrs. Bayly's will that it should be upheld. As to the point on alimentary provisions, in questions of election these provisions are daily set aside in Scotland—for nearly every case of election contains them; therefore *In re Wheatley* (2) and *In re Vardon's Trusts* (3) do not apply. Here there is a fund available for compensation, namely, the interest of the sum of 5000*l*., which can be accumulated for the benefit of Mrs. Bayly's grandchildren.

The House took time for consideration.

1911. March 20. LORD ATKINSON. My Lords, the main question for decision in this case, as developed in the very able and helpful arguments addressed to your Lordships by the

(1) 2 Ves. Jr. 366a.
(2) (1884) 27 Ch. D. 606, 608.
(3) (1885) 31 Ch. D. 275.
(4) (1750) 2 Ves. 30, 33.
(5) 24 D. 1191, 1205.
(6) 4 R. 45, 56.

counsel appearing for the respective parties concerned, is, as I understand it, this: whether the doctrine styled in English Courts of law the doctrine of election is identical with the doctrine styled in the Scotch Courts of law the doctrine of "approbate" and "reprobate," or whether the latter differs from the former in this essential, that a beneficiary under a deed or will is, under the Scotch law, never to be put to his election unless there can be found in the particular instrument in express words, or by necessary implication, a declaration of the benefactor's intention that he shall be put to his election; and, further, that this declaration or expression of intention cannot be implied unless it be shewn that the benefactor knew, or must be taken to have known, that he was disposing, by the particular instrument, of property not his own, but belonging, in whole or in part, to the beneficiary on whom he confers a benefit, or to whom he makes a gift by that same instrument. One may put aside the case of an express condition or direction. In such a case the beneficiary must comply with the express requirements of the deed or will.

It must, I should think, be assumed that every donor who executes a deed, and every testator who makes a will, intends the gifts he purports to make, and the benefits he purports to confer, should be taken and enjoyed by those for whom he designs them and none others, so that a beneficiary who asserts a claim to something given to another by their common benefactor necessarily defeats pro tanto the intention of that benefactor. This, it is urged, is not enough in Scotland.

In the case of *Noys* v. *Mordaunt* (1) the English doctrine is based upon an implied condition. In that case a testator, having two daughters, his co-heiresses, devised his fee simple lands to one of them, and lands settled upon him entail to the other. The first devisee claimed a moiety of the entailed lands. The Lord Keeper (Sir William Cowper) in delivering judgment said: "In all cases of this kind where a man is disposing of his estate amongst his children and gives to one fee-simple lands and to another lands entailed or under settlement, it is upon the implied condition that each party acquits and releases the other." Nothing

(1) 2 Vern. 581.

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whatever is said as to whether the testator knew, or should be taken to have known, that he could not devise the entailed estate to one of his daughters to the exclusion of the other. No point of that kind was made. If he is to be assumed to have known the law, and, therefore, to have known that he was devising to one daughter not only her own share of the entailed estate, but also her sister's share, and that the necessary expression of intention is to be implied from this fact, one would suppose that it might with equal plausibility be assumed in the present case that the testatrix knew, or must be taken to have known, that she could not appoint to her grandchildren the corpus of a fund she was only empowered to appoint to her children. If so, the requirement of the Scotch law was satisfied.

The same remark applies to the case of *Whistler* v. *Webster* (1) and to every other English authority down to the present time. According to them apparently, the donor's knowledge, actual or imputed, that he is bestowing on another property not his, the donor's, own, is a matter of indifference; whereas, according to the argument of Mr. Blackburn, it is the crucial, the determining, consideration under the Scotch law upon which depends the implied expression of his intention that the beneficiary must elect. This difference between the two systems, if it exist, is fundamental. And what puzzles one is how it has come about that great judges like Lord Eldon, even when deciding a Scotch case, and Lord Cairns, and in recent times Lord Robertson, never alluded to this differentia in the judgments they have each respectively delivered dealing with the doctrine of approbate and reprobate, or seemed to be aware of its existence.

I refer to Lord Eldon's judgment in *Ker* v. *Wauchope*. (2) That was a case of which the subject-matter was the estate of the Duke of Roxburgh, held to be a domiciled Scotchman. The appellants, the Ladies Ker, were the co-heiresses-at-law and next of kin of this nobleman. In the month of March, 1804, he fell sick of the complaint of which he died, and on the 19th of that month executed a deed by which he directed the respondents, John Wauchope and James Dundas, trustees named in a settlement of the previous year, to sell and dispose of all his unentailed

(1) 2 Ves. Jr. 366a. (2) 1 Bli. 1.

real estate, and to invest the proceeds thereof and of his personal estate, after payment of his funeral expenses, debts, and legacies left by his will, in the public funds, or upon real security in Scotland, and to pay the interest and dividends thereof equally between the appellants, with certain ultimate trusts not necessary to mention. The Duke was the owner of these lands. He had full disposing power over them. He died the day the deed bears date, March 19, 1804, without issue. The appellants, as his co-heiresses-at-law, immediately instituted an action to have this deed set aside so far as it purported to convey land, on the ground that it had been executed on the Duke's deathbed. They succeeded, and their right to the land as co-heiresses-at-law was established on appeal by a judgment of your Lordships' House.

The surviving trustee then instituted an action to have the rights of the several parties in the trust funds remaining in his hands ascertained and declared. In that proceeding the Ladies Ker claimed, under the terms of this deed of March 19, 1804, which they had caused to be set aside as invalid to dispose of the realty, a life interest in the residuary personal estate, and the main question for decision was whether they, having "reprobated" the deed in so far as it purported to dispose of the realty, could "approbate" it so far as it purported to dispose of personalty. It was decided that they could not do so; that they could not claim the life interest given them either as beneficiaries under the deed, or as next of kin. Having read the arguments most carefully, I cannot find that it was even suggested that the Duke must be assumed to have known the law, and therefore to have known that he was attempting to dispose of his estate in a manner which, in the event of his immediate demise, was by law prohibited, or that, for that or any other reason, the deed was to be construed as containing by implication an expression of his intention that these ladies should be put to their election. Nothing of the kind. The decision is rested upon the broad equitable grounds on which the English doctrine of election is rested, and no reference whatever is made to the distinctions relied upon by the respondents in the present case.

Lord Eldon, in giving judgment, says (1): "I do not undertake

(1) 1 Bli. 1, at p. 21.

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a minute discussion of the arguments urged in this case; it will be sufficient to state the fundamental principle which ought to guide our decision. The deed in question upon this appeal is in the nature of a testament. *It is equally settled in the law of Scotland and of England that no person can accept and reject the same instrument.* If a testator gives his estate to A., and gives A.'s estate to B., Courts of Equity hold it to be against conscience that A. should take the estate bequeathed to him and at the same time refuse to effectuate the implied condition in the will of the testator. The Courts will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what by the same will is given or intended to be given to another person." The italics are mine.

Again in *Codrington* v. *Codrington* (1) Lord Cairns thus expresses himself: "By the well-settled doctrine which is termed in the Scotch law the doctrine of 'approbate' and 'reprobate' and in our Courts more commonly the doctrine of 'election,' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them. The authorities on this branch of the law are very fully referred to in the judgment given in this case by my noble and learned friend who was then Lord Chancellor (Lord Selborne) (2), and they were considered not long since in this House in the case of *Cooper* v. *Cooper*." (3)

In the case of *Douglas-Menzies* v. *Umphelby* (4) a testator domiciled in Scotland, having an estate in Great Britain and another in Australia, executed two testamentary instruments, one disposing of his British estate, and the other of his Australian estate. In his so-called British will he directed that his British estate should be administered according to the law of Scotland and in his Australian will that his Australian estate should be administered according to the law of New South Wales.

The widow by proceedings in Scotland established, in the events which happened, her legal right in the name of jus relictæ

(1) L. R. 7 H. L. 854, 861.
(2) (1873) L. R. 8 Ch. 578.
(3) (1874) L. R. 7 H. L. 53.
(4) [1908] A. C. 224.

and terce as against the British estate. She then in the Australian Courts claimed the benefit of the dispositions in her favour contained in the Australian will. It was held that the two instruments formed only one will containing a coherent scheme of intention, and that the widow, having elected to defeat the will in part, could not claim under it and accordingly took no interests under the Australian will.

Lord Robertson, in giving judgment (1), says: "In considering the merits of the decision appealed against, it is well to remember what is the doctrine of approbate and reprobate invoked by the appellant. Although the name is different the principle—as was laid down by Lord Eldon in *Ker* v. *Wauchope* (2)—is the same as that of the English law of election. It is against equity that any one should take against a man's will and also under it. This rests on no artificial rule but on plain fair dealing. If any one has the right by law to take a share of a testator's estate which the testator has not given, but has otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefits."

I am quite unable to reconcile these pronouncements with the rule contended for by Mr. Blackburn. I think they establish that the English and Scotch doctrines, though differing in name, are identical in principle, and, therefore, that in this case (subject to the second point which has been raised) the children of the testatrix claiming in default of appointment, and also claiming their legitim in their mother's separate estate, should be put to their election between those benefits and the benefits conferred upon them by her will.

The second point is this. It is urged that as the life rents given by Mrs. Bayly's will are only alimentary, the English case of *In re Wheatley* (3) applies; that her daughters are in the same position as the married ladies who in that case were entitled to life interests settled to their separate use without power of anticipation; and that since in that case these interests could not, by reason of this restraint, be appropriate to compensate the beneficiaries who would be disappointed by election to take

(1) [1908] A. C. at p. 232. (2) 1 Bli. 1.
(3) 27 Ch. D. 606, 608.

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against their benefactor's will, the ladies were held not to be bound to elect, so in this case neither are the testatrix's daughters bound to elect.

The answer to that contention is that life rents, though given solely for alimony, are not in the same position under the Scotch law in relation to this doctrine of "approbate" and "reprobate" as are life interests such as those dealt with in *In re Wheatley* (1) under the English law. The gift in the former case does not prevent election, and the life interest given to the daughters may be seized upon and applied to compensate the disappointed beneficiaries. *Macfarlane's Trustees* v. *Oliver* (2), a case of high authority, establishes this, and indeed, as I understood, it was admitted by counsel at the Bar that this was so. This in the result would mean, in the present case, that the interest of the sum of 5000*l.*, half Mrs. Bayly's separate estate, could be accumulated to compensate her grandchildren for the loss of the benefits she designed for them.

I therefore think that the judgment appealed from was wrong and should be reversed, and this appeal allowed.

EARL OF HALSBURY. My Lords, I have had an opportunity of reading in print the very learned and most satisfactory judgment of my noble and learned friend who has just pronounced judgment and that of my noble and learned friend Lord Shaw, and I do not think it necessary to add anything to what they have said.

LORD MACNAGHTEN. My Lords, I also have had the opportunity of reading in print the judgments of my noble and learned friends, and I entirely agree with them.

LORD SHAW OF DUNFERMLINE. My Lords, in the special case presented for the opinion and judgment of the Court various questions of law were put. Some of these have been settled and others are superseded, and I venture to state the narrative in its briefest form, so as to bring out the only point which was submitted to your Lordships, and which remains between the parties for settlement.

(1) 27 Ch. D. 606. (2) (1882) 9 R. 1138.

The late Mr. Humphry Ewing Crum Ewing, by his trust disposition and settlement, conveyed a certain share of the residue of his estate for the behoof of his daughter, Mrs. Bayly, and her children, the income to go to Mrs. Bayly during her life as an alimentary provision, and the capital to be divided among her children in such proportions and "subject to such restrictions, provisions, and limitations" as she might direct; and, failing appointment, the children were to share the capital equally. Mr. Crum Ewing died in 1887. Mrs. Bayly died in 1908. The net value of the third share falling to her in life rent and her children in fee was about 17,000*l*. Under Mrs. Bayly's marriage contract she had a power of appointment among her children of a sum of 2000*l*., which her father had conveyed to the marriage contract trustee. Her own separate estate amounted to about 10,000*l*.

By Mrs. Bayly's trust disposition and settlement she purported to affect and dispose of not only the two last-mentioned funds, but also the first fund of 17,000*l*., of which, as has been shewn, she had only an alimentary life rent, and the fee of which was in her children subject to her apportionment. That she clearly meant, however, to embrace that fund along with the other two within the scope of her testamentary dispositions, is, I think, proved by the language of her settlement. The estate is in general terms conveyed to trustees as "all and sundry the whole estate and effects, heritable and movable, real and personal of whatever kind and denomination and wheresoever situate, which shall belong to me at the time of my decease, or over which I may have power of disposal by will or otherwise"; and she declares towards the close of the deed that "these presents are granted in exercise of all powers of disposal, apportionment or otherwise competent to me under the said ante-nuptial contract, and the said trust disposition and settlement by my said deceased father." On this head the deed need not be further referred to. I agree with the opinion expressed in the Court below to the effect that it is quite manifest that Mrs. Bayly meant by her will to deal with the funds flowing from her father's estate, with the marriage contract funds, and with her own funds as one massed estate.

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This estate thus massed was destined by Mrs. Bayly's settlement in certain shares to her children in life rent, and their respective children in fee. So far as this destination affected the share of the estate proceeding from her father, in which Mrs. Bayly herself had only a life rent, and in which her children had a fee, it was a bad exercise of the power of apportioning the fee among her children to attempt to convert her children's rights into a life rent, and propone the fee to their children. The judgment of the Court of Session holding that this was a bad exercise of the power is not challenged.

The question disputed at your Lordships' Bar is whether Mrs. Bayly's children are entitled to have payment made to them of the capital of the fund flowing from their grandfather's estate, thus defeating the intention of their mother that their right therein should be confined to a life rent, and at the same time are entitled to participate in the benefits conferred on them by Mrs. Bayly with regard to the other portions of the estate dealt with by her will. These children are, on the one hand, maintaining the invalidity of Mrs. Bayly's trust deed as an exercise of the power of appointment among her children conferred by her father, while, on the other hand, they are maintaining the validity of the deed, in so far as it conferred upon them benefits out of her own estate. The strongest presentment of the case for their doing so is to say that, in so far as these children were concerned, their mother was dealing with capital and property which were not her own but theirs, and that they have a right to confine her testamentary settlements to her own estate. Accordingly it is contended that the children are not put to their election because their rights under the settlement, in so far as it could be effected, namely, in so far as it conveyed Mrs. Bayly's estate, are separable from their independent rights. These three facts accordingly remain—(1.) that Mrs. Bayly's settlement purports to deal with a massed estate; (2.) that this massed estate consists partly of property really already belonging in capital to her children and not to her; and (3.) that the estates, her own and that other, are separable. In these circumstances the majority of the

First Division has held that the children are not put to election.

My Lords, I have considered with the greatest respect and care the judgments of the Court below, elucidated and criticized as these were by powerful arguments at your Lordships' Bar. I am of the opinion that the conclusions reached by Lord Johnston are sound conclusions. Having investigated to the best of my ability the case law on the subject, Lord Johnston's judgment appears to me to be in accord with the principles both of the law of England and of the law of Scotland.

As to the law of England, my Lords, I really do not think that there can be any manner of doubt; and one of the most remarkable facts (in view of the argument addressed to your Lordships to the effect that there was a difference between the laws of the two countries on the subject) is that the most authoritative pronouncements in both countries do not give any countenance to the idea that such difference exists. The doctrine of approbate and reprobate in Scotland and the doctrine of election in England are the very same thing under different names. They depend upon a principle, which in its comprehensiveness and simplicity was put by Lord Eldon in the House of Lords in the Scotch case of *Ker* v. *Wauchope* (1) thus: "It is equally settled in the law of Scotland and of England that no person can accept and reject the same instrument." In as comprehensive although ampler language, Lord Cairns puts again the law of both countries on the same footing of general principle in *Codrington* v. *Codrington* (2): "By the well-settled doctrine, which is termed in the Scotch law the doctrine of approbate and reprobate and in our Courts more commonly the doctrine of election, where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent therewith."

My Lords, it is perfectly true that, owing to the peculiarity of the English law of succession, there does not arise the

(1) 1 Bli. 1. (2) L. R. 7 H. L. 854, 861.

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application of the doctrine of election except with regard to provisions in gremio of the deeds. In the law of Scottish succession, however, and in the law of all countries where the rights of children are of such a nature that it is in the general case beyond the legal power of a parent totally to disinherit them, there come frequent occasions when the legal rights of the children have to be balanced against the conventional provisions of a settlement under which they also have benefits. If, however, my Lords, they choose their legal rights, it is familiar and elementary that they cannot at the same time choose their conventional benefits. Their legitima portio falls to them as a debt due from the estate, and they cannot on the one hand pro tanto deplete the estate, and on the other hand claim conventional provisions made out of it by the parents' settlement. That, my Lords, is only an illustration of a difference in the law of succession, and therefore of extending and applying the principle of approbate and reprobate to that particular; but nothing of this imports any change in the principle to be applied. Although illustrations occurred in argument founded upon the ancient and highly-valued Scottish system of the children's indefeasible claim to legitim as against, or in preference to, a testamentary provision, the principle of this case is not touched by the illustrations. As has been said, so far as the authorities go, judges of the highest eminence treat the law of the two countries as the same.

It remains to consider whether a difference,—apparently unknown to these judges,—has grown up in Scotland under the authority of the Scotch decisions after referred to. Lest injustice be done to the argument, I cite it as it appears in the respondents' case. "In arriving at the testator's intention in such cases as this, where he has attempted to do what it was not in his power to do, a leading consideration in Scots law has always been, 'Did the testator know that he was exercising power which he did not possess?' The respondents are aware that in this respect the law of Scotland differs from the law of England, and this is clearly reflected in the statements of the leading text-writers; but the difference is directly traceable to the Roman law on which the Scots law is founded. By the

Roman law where one bequeathed a subject which he knew did no belong to him, the heir had to purchase it for the legatee or to pay its value to him. Where the testator rei alienæ believed the subject to be his own, which in dubio was to be presumed from the act of bequeathing, the legacy was void. This is still the law of Scotland." My Lords, I shall refer in a moment to the doctrine of the civil law; but the case proceeds: "This is still the law of Scotland and explains why the maxim that res aliena scienter legata raises the presumption that the owner of the res, if a beneficiary under the deed, is to be put to his election, and the maxim that res aliena inscienter legata raises no such presumption, have always been recognized in Scotland as leading rules in cases of approbate and reprobate." My Lords, of this passage I will only say that I find no justification for the supposition that such a notable non sequitur is part of the law of Scotland.

With regard to the law of Rome, a doctrine or principle of the civil law adopted into the practice of Scotch jurisprudence is an authority to which all would bow. But the observation must be at once made that the passage from the Institutes of Justinian (2 : 20 : 4) does not appear to have any real bearing on the doctrine of election at all. It is not treated by Erskine (III. 9, 10), who echoes and expounds the passage, as having any such bearing. The Roman law was simple enough. If a person bequeathed what he knew did not belong to him, it was assumed that that was equivalent to an instruction to his heir to buy the thing bequeathed for the legatee or to pay to the legatee its equivalent. The doctrine could not apply to things which it was beyond the power of the legatee to secure on account of their not being in commercio,—as, for instance, the illustrations are given of a testator bequeathing a temple, or even the Campus Martius. In such a case the whole legacy fell. The legacy, of course, also fell in the cases where the subject of it did not belong to the testator, but as to which it was not known what the views of the testator on the subject of ownership were. The reason given in the Institutes is significant. It is as follows: "Forsitan enim, si scisset alienam, non legasset," and a rescript of Antoninus Pius is cited in support of this reason.

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In short, the endeavour was simply to get at the real mind of the testator with regard to whether or not it was meant that the specific thing or its equivalent was to go in all the circumstances to the legatee. The only underlying principle in the whole of that section of the Institutes has reference to the specific legacy bequeathed or purported to be bequeathed. There is no reference whatever to the embarrassment produced by the legatee having to choose between testamentary provisions on the one hand and independent rights or property which he has in the thing on the other. Nor, I may be permitted to add, could this embarrassment or this election possibly arise in regard to the res aliena dealt with in that title of the Institutes. For that res aliena was neither the property of the testator nor of the heir. The note of Cujacius is unanswerable: "Res heredis non habetur pro aliena." As shewn by a succeeding section, res aliena is treated as quite a different thing from res legatarii. For my own part, I do not think that the reference to this Institutional passage in the Roman law has produced, in the authorities, any illumination on the subject. If authority or the views of Roman jurists on the point of approbate and reprobate be sought, it will be found in a different quarter, namely, from the 30th and 31st books of the Digest. A dictum, for instance, of Pomponius is as apt and as succinct as that of Lord Eldon: "Legatarius pro parte adquirere, pro parte repudiare, legatum non potest."

My Lords, passing now from the alleged authority of the civil law to the proposition that "the law of Scotland differs from the law of England" upon this subject, I am of opinion that this proposition is not well founded. I think it right to deal with the state of the Scotch authorities upon this particular point. Weight in argument was attached to two opinions of learned judges in Scotland. In *Nesbit's Trustees* v. *Nesbit* (1) Lord Cuninghame begs "distinctly to disclaim every notion that the law of Scotland in questions analogous with the present has been derived from English precedence or practice. Far from it." He refers to the Roman law as being "the chief fountain of our jurisprudence," and, after certain allusions to England, which

(1) 14 D. 145, 149.

need not be further referred to, he concludes by the observation that "in the present state of the law it is satisfactory to find that the decisions in both countries, in cases of election, have been to the same import, when analogous questions have occurred in either." I do not find, my Lords, in that authority much support for the proposition of the difference contended for.

The other authority is the late Lord Curriehill, whose observations in *M'Donald* v. *M'Donald* (1) have been much relied upon. That learned judge, referring to a decision of Lord Romilly in *Churchill* v. *Churchill* (2), says this: "The rule of law which underlies that judgment, and, indeed, all the decisions as to election or approbate and reprobate, is, that, although res aliena scienter legata in a testament bequeathing a legacy to the owner of the res aliena"—(if this be a reference to the civil law, I have already commented upon the misconception)—"may put him to his election between claiming the legacy and taking his own property, yet if the testator made his bequest erroneously, believing that he had the power, while he had it not, the legatee will not be put to his election. The rule is illustrated in the case of *Douglas' Trustees* v. *Douglas*." (3)

My Lords, the alleged "rule of law" is treated as applicable both in England and in Scotland. I understand your Lordships all to be of opinion that such a rule forms no part of the law of England.

Further, the judgment of Lord Romilly in the case of *Churchill* v. *Churchill* (2) does not, it appears to me, give countenance to it. The case of Churchill was one of a kind of which there have been various examples in Scotland, to which I shall afterwards refer. The testator had a power of appointment to his children. He did exercise such a power in his will, but in a subsequent portion thereof he created a distribution inconsistent with the exercise of the power, and involving restrictions of the rights of the appointees. It was held that the restrictions in his will must fly off, and that the appointment under that deed must be considered as absolute. The appointees,

(1) 4 R. 45. (2) (1867) L. R. 5 Eq. 44.
(3) 24 D. 1191.

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taking accordingly under an absolute appointment and under the will, were not precluded from taking other benefits conferred by the same document. They were not, in short, electing between taking rights under the will and rights inconsistent with the will. All the rights which they claimed were rights under the will, if properly construed. If one examines the judgment of Lord Romilly, my Lords, one will find but little support for the alleged "rule of law." He makes observations, repeated in the course of his opinion, that it would be highly undesirable to determine the rights of appointees or legatees, according to the state of mind or opinion of the testator; that is to say, to import into the construction of his settlement a certain state of his knowledge so as to qualify rights, which, apart from that state of knowledge, this very same deed on its proper construction would have given.

Finally, it only remains to add, with regard to this opinion of Lord Curriehill, that the point relied upon as above cited was not a decision, and indeed did not enter into the merits of the question determined in the case of M'Donald. It may be as well to state what that question really was.

Sir John and Lady M'Donald had power under an ante-nuptial contract of marriage to make an appointment of the marriage trust funds among the children of the marriage. The spouses made an apportionment of the sum of 25,000*l.* to the eldest son. In the language of Lord Neaves (there having been litigation as to the shape and condition of the apportionment), "it was a positive and valid deed of appointment, by which there was given to the defender, the eldest son of the parents, a sum of 25,000*l.*, which the parents allotted and apportioned as his share." In this House this was held an absolute appointment, and "what was said as to applying the 25,000*l.* to the extinction of debt . . . . was not a condition of the appointment, so as either to make it null or to make the desire so expressed obligatory on the defender." It was, however, maintained that a deed of entail, executed by the father, imposed upon the son an obligation to disencumber the estates of the 25,000*l.*, and alternatively a declarator was asked that the son "had elected to take the 25,000*l.*, and was bound to denude of these estates." It was held "that the eldest

son was not put to his election, but that, although he had taken the money absolutely and kept it up as a debt against the entailed lands, he was also entitled to remain in possession of those lands." Standing the judgment of this House, the Second Division of the Court of Session had no difficulty in holding that, once the condition supposed to be attached to the allotment of 25,000*l.* flew off, the case made by the pursuer that there could be an application of the doctrine of election, or approbate and reprobate, could not prevail.

The only other case of importance which was founded on at the Bar was the case of *Douglas' Trustees* v. *Douglas.* (1) I have referred to Lord Curriehill's judgment in that case already, but I think it right to point out that the true reason why the doctrine of approbate and reprobate could not be applied in such a case had nothing to do with the point put in argument here or with a question as to the state of mind or knowledge of the testator. The true reason of the case was that the doctrine of approbate and reprobate cannot be introduced where it is impossible for the person against whom it is pleaded effectively to exercise the election demanded. Archibald Monteith appointed his property to be entailed in his own name, and next on his brother James and his issue. James was Archibald's trustee. He massed his own estate with Archibald's and placed the combined estates under another and different entail. General Monteith Douglas, Archibald's heir of entail, had, of course, no difficulty in establishing that James had acted ultra vires in putting Archibald's estate under a fresh entail and in holding that James's direction could only apply to his own estate. In that estate General Monteith Douglas had also certain rights. It was urged that General Monteith Douglas was bound to elect between taking his rights as heir of entail under Archibald's deeds and taking the benefits conferred on him in regard to James's estate. It will be seen, however, that General Monteith Douglas could not possibly elect in such a situation; for Archibald's estate was settled not upon him alone, but was settled upon him and a series of heirs of entail; and accordingly any so-called election by him would

(1) 24 D. 1191.

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have been to the prejudice of a separate line of heirs, and such a transaction would not be permitted by law. In the language of Lord Justice-Clerk Inglis (afterwards Lord President), "I think the party who is put to his election must have a free choice, and that whichever alternative he chooses he shall have a right absolutely to that which he has chosen without the possibility of his right being interfered with or frustrated by the intervention of any third party." That General Monteith Douglas had no such right was clear, because if he had attempted to exercise it he would have forfeited the entail. As Lord Benholme puts it, in a word, "He had it not in his power to permit or to consent to the arrangements of James in regard to Archibald's estate being carried into effect. He was bound to do what he did in keeping the estates and entails distinct, and he had no alternative." My Lords, this is the case of Douglas. I am bound to say that I view with some surprise the comments which have followed it. One of these, proceeding from a very high authority, namely, the late Lord M'Laren, I will cite. In his Wills and Settlements (vol. 1, 252) he states: "If a testator, erroneously supposing himself to have a power of appointment over the property of another, disposes of it by will, his legatees, who repudiate the appointment, are not thereby put to their election with respect to the testamentary provisions in their favour." The only authority, my Lords, given for that proposition is the case of Douglas, and, in my opinion, the case of Douglas was decided upon another ground which I have stated, and the proposition otherwise appears to me quite without support in the law of Scotland.

My Lords, I think some confusion has entered into this case by endeavouring to give a much wider application than is legitimate to dicta laid down and clearly applicable only to the particular type of case in which they were used. I have already illustrated this, and I will conclude by citing a recent and strong instance of what I mean. The case of *Matthews Duncan's Trustees* v. *Matthews Duncan* (1) has been cited as negativing the proposition of election put forward in this case, and in support of

(1) 3 F. 533, 540.

the view, that where an appointment in a settlement had the effect of reducing the appointee's right to a life rent and otherwise restricting it, these appointees could claim their rights, independent of the will, and also certain other rights given to them by the will of the testator. What was held, however, in Matthews Duncan's case was, not that there was no appointment, but that there was; not that the will had made a bad appointment, but that if properly construed, it had made a good appointment. After citing Sugden on Powers (p. 526), "Where conditions are annexed to the gift not authorized by the power, the gift is good and the condition only is void, so that the appointee takes the fund absolutely," Lord Adam, applying the principle to Matthews Duncan's case, adds: "If the settlement is to be read as if it contained none of the conditions attempted to be imposed on the children's shares of their provisions, then they are only claiming what the settlement gives them." They were, in short, not claiming against the settlement or electing as between benefits under it and independent of it, and the case accordingly was not one for applying the doctrine of approbate and reprobate.

My Lords, that class of case is differentiated, I think, completely from cases like the present. For in the present case it is agreed, and the judgment of the Court of Session stands to the effect, that the testatrix has made no exercise of a power of appointment. What the testatrix has done is deliberately to mass together along with her own her children's property. I do not think it is on the whole doubtful that her intention was that, if these children converted in favour of their children their rights of fee into a right of life rent, then the testatrix would endow them with a life rent of what she herself was leaving. There is no impediment to the children doing this. Their rights are independent, and they are unfettered, for instance, by entail; but they do not choose to do so. In these circumstances, who can determine what the testatrix would have done if the scheme of the settlement, its essential being the massing of the estates, had been contemplated, as being disturbed entirely by the children's declining to acquiesce in the testatrix's intentions? who can tell whether the testatrix would in such circumstances have given

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them the life rent in her own estate which they now claim? Such conjectures are unavailing; but what does remain is that the life rent to the children of the testatrix's own estate was a life rent given on the supposition and the footing that a life rent and no more was to be taken of the estates which were massed along with it. This appears to me to raise, conformably, on the one hand, to the intentions of the testatrix in this deed, and, on the other, to the general principles of the doctrine of approbate and reprobate, a case for its application. I understand your Lordships to be clear that that application is in accordance with the law of England, and I am humbly of opinion that it is also in accordance with the law of Scotland.

My Lords, there is a case of *Wedderburn Dundas* v. *Dundas* (1), on which we have not had the advantage of having the views of the parties, and which is not referred to in the judgments of the Court below. But the opinions in that case appear to me to have a direct and helpful bearing on the present case. General Dundas, a domiciled Scotchman, by his settlement, conveyed his whole property to trustees. Part of the estate was English, and the deed was defective in the form of conveyance of the English estate. It was found by the Court of Session and this House that the "heir to the English estate could not take it and at the same time claim a provision made to him by the trust deed." In that case the testator meant to convey property over which he had full power; in the present case the testatrix meant to convey property over which she had only a limited power. That is the difference; but the analogies are that, (1.) just as in the present case, the deed was bad in so far as purporting to convey certain property; (2.) the deed massed that property, not effectively conveyed, with the testator's other estate effectively disposed of; while (3.) the claimant of benefits under the settlement was taking, in his own separate right and free from its provisions, a part of the property which the will purported to deal with,—all just as here.

The Lord Ordinary (Cringletie) alluded to a case of *Trotter* v. *Trotter* (2) which had been cited, and then he proceeded thus: "In

(1) (1830) 4 W. & S. 460. (2) (1826) 5 S., 1st ed. 78; 2nd ed. 72.

that case it was admitted on all hands, both by English and Scotch lawyers, that the law of approbate and reprobate in Scotland and the law of election in England are to the same effect, and that they both apply wherever it is clear that the testator intended to bequeath or convey a subject but has failed to do so in a legal technical manner. If, in such case, the person to whom that subject belongs or falls, through the failure of the proper technical conveyance, and which he would not have got if the deed had been technically formal, has also a separate interest in the deed, and while he claims that separate interest claims also the subject conveyed away from him informally, he will not be permitted to take both. In Scotland the law of approbate and reprobate applies; in England, that of election. Both go to this, that the person may make his election, and take one, viz., either take the share arising out of the deed, if the testator's whole intentions have effect, or the subject not technically conveyed; but not both." And the Lord Ordinary sums up: "There being no doubt that his father did not intend that he should have that subject and a share of all the others, the law of approbate and reprobate applies."

This judgment was affirmed in the Second Division, the Lord Justice-Clerk Boyle noting that "it is clear that the intention of General Dundas was to mass all his estates." On appeal the decision was confirmed by this House. I am of opinion that the points of principle which I have ventured to cite from these judgments are not merely applicable to the case of a settlement which deals ineffectively, owing to defect of form, with a certain portion of the general mass of estate purported to be conveyed, but also to the case of a settlement which deals ineffectively therewith owing to defect of power.

With regard to *Whistler* v. *Webster* (1), although that case followed *Noys* v. *Mordaunt* (2), and may not be considered (in the mass of decisions) of the pre-eminence attached to it, I cannot but agree with Lord Johnston in his view that it has a special application to the argument presented by the respondents in this case. When, for instance, Sir Richard Arden M.R. put the question thus: "That no man shall claim any benefit under a will

(1) 2 Ves. Jr. 366a. (2) 2 Vern. 581.

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without conforming, as far as he is able, and giving effect to everything contained in it whereby any disposition is made shewing an intention that such a thing shall take place; without reference to the circumstance whether the testator had any knowledge of the extent of his power or not," the language appears to me to cover the argument presented, and the answer is quite as satisfactory: "Nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another. It is enough for me to say he had such intention, and I will not speculate upon what he would have intended in different cases put."

As I have already indicated, I think that this testatrix did intend that her testamentary disposition should affect the entire massed estates. In my view it is not sufficient to say, as the learned judges of the majority in the Court below have said, that these massed estates are separable, and that the will can be applied to the one portion which remains after the children's capital is detached from the mass. It is just in such cases that the principle of approbate and reprobate is equitably and appropriately applied. It does not appear to me to be legitimate that the estates should be separated simply because they are separable, if the testatrix intended, on the contrary, that they should be treated in the mass, and disposed of her own property upon that footing. For these reasons, my Lords, I am of opinion that the judgment of the majority of the Court below falls to be reversed, and an answer in a contrary sense given to the question dealt with in the judgment.

There was taken a separate point of the testatrix having prescribed against her children taking legitim or the marriage contract provisions, as well as those under the will, whereas she did not make such a prescription against them claiming their independent rights. As to that, my view is that this is not sufficient to entitle a Court to conclude that a claim of separate rights, independent of the will and destroying its general scheme, together with a claim of benefits under the will, was any part of the contemplation or intention of the testator. On that subject also I think Lord Johnston has come to a correct conclusion.

LORD ROBSON. My Lords, I concur and I have nothing to add to the reasons which have been stated with such fulness.

LORD LOREBURN L.C. My Lords, I also agree.

Ordered and adjudged : That the interlocutor of the 28th day of January, 1910, *so far as complained of in the said appeal, be, and the same is hereby, reversed : And it is further ordered, that the said cause be, and the same is hereby, remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment : And it is further ordered, that the costs of all parties incurred by them in respect of the action in the Court of Session, and also the costs incurred in respect of the said appeal to this House, be paid out of the general fund of the estate (i.e.* (1.) *the portion of the estate of the said deceased Humphry Ewing Crum Ewing life-rented by the deceased Mrs. Jane Coventry Ewing Crum or Bayly, and* (2.) *the estate of the said deceased Mrs. Jane Coventry Ewing Crum or Bayly), the said last-mentioned costs to be taxed as between solicitor and client.*

Lords' Journals, March 20, 1911.

Agents for appellant : *Grahames, Currey & Spens, for Webster, Will & Co., W.S., Edinburgh.*

Agent for respondents : *John Kennedy, W.S., for W. & J. Cook, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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March 21.

SIR R. A. E. CATHCART . . . . . APPELLANT;

AND

ALEXANDER H. CHALMERS . . . . . RESPONDENT.

Landlord and Tenant—Compensation for Improvements—Notice of Claim—Agreement—Agricultural Holdings (Scotland) Act, 1883 (46 & 47 *Vict. c.* 62), *ss.* 5, 36—*Agricultural Holdings Act*, 1900 (63 & 64 *Vict. c.* 50), *s.* 2, *sub-s.* 2.

By the Agricultural Holdings Act, 1900, ss. 1, 10, where a tenant has made on his holding any improvement comprised in the First Schedule to this Act, he shall, subject in Scotland to the Agricultural Holdings (Scotland) Act, 1883, "and in this Act mentioned, be entitled, at the termination of a tenancy, on quitting his holding to obtain from the landlord as compensation under the said Acts for the improvement such sum as fairly represents the value of the improvement to an incoming tenant." By s. 2, sub-s. 2, any claim by a tenant for compensation under the Agricultural Holdings (Scotland) Act, 1883, or "this Act in respect of any improvement comprised in the First Schedule to this Act shall not be made after the determination of the tenancy."

The respondent, who was a tenant farmer of the appellant, gave notice in the terms of his lease of his intention to terminate his tenancy at November 28, 1908. Upon November 9, 1908, he sent to the appellant notice of his claim for compensation for improvements, in the terms of the Agricultural Holdings (Scotland) Acts, 1883 to 1900, and upon November 26 sent an amended claim. An arbiter was appointed, but the appellant applied for an interdict to prevent the arbiter from acting, on the ground that the respondent had lost his right to compensation by virtue of the following provision embodied in the lease: "Provided always that no claim for compensation under the said Acts, or under these conditions, shall be made by the tenant later than one month prior to the determination of the tenancy":—

Held, affirming the decision of the Second Division of the Court of Session, that the clause in the agreement was void; for it attempted to deprive the respondent of the right to compensation under the Act of 1900, under which he was entitled to make his claim up to the last day of the tenancy.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland. (1)

This case arose in respect to arbitration proceedings between

(1) (1910) 48 S. L. R. 207; 1911 S. C. 292.

the appellant, Sir R. A. E. Cathcart, Bart., and the respondent, A. H. Chalmers, and the sole question was whether a clause (No. 17) in a document called "Articles, Regulations, and Conditions," incorporated by reference into the lease, dated 1903, between the parties, prevented the arbitration. The clause contained the following :—"Provided always that no claim for compensation under the said Acts, or under these conditions, shall be made by the tenant later than one month prior to the determination of the tenancy."

It appeared that the respondent gave notice in terms of his lease of his intention to terminate his tenancy of the farm of Camregan, Ayrshire, at November 28, 1908; that on November 9, 1908, the respondent sent to the appellant notice of his claim for compensation for improvements in terms of the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), to 1900 (63 & 64 Vict. c. 50); and that on November 26, 1908, he sent an amended claim and asked for arbitration upon his claim. The respondent contended that his claim was in time by virtue of the Acts of 1883 and 1900(1), and he quitted his farm on November 28, 1908. The other respondent, J. M. Pearson (as to whom the appeal was heard ex parte), was

(1) Sect. 1, sub-s. 1, of the Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), which applied by s. 10 to Scotland, and which re-enacted s. 1 of the Agricultural Holdings (Scotland) Act, 1883, was as follows :—

"Where a tenant has made on his holding any improvement comprised in the First Schedule to this Act he shall, subject as in the Agricultural Holdings (England) Act, 1883 (in this Act referred to as the principal Act) and in this Act mentioned, be entitled at the determination of a tenancy, on quitting his holding to obtain from the landlord as compensation under the said Acts for the improvement such sum as fairly represents the value of the improvement to an incoming tenant . . . ."

By s. 2, sub-s. 2, "Any claim by a tenant for compensation under the principal Act or this Act in respect of any improvement comprised in the First Schedule to this Act shall not be made after the determination of the tenancy."

By s. 36 of the Agricultural Holdings (Scotland) Act, 1883, which with s. 5 remained unrepealed by the Act of 1900, "Any contract or agreement made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement specified in the schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void."

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appointed arbiter on September 7, 1909. Thereupon the appellant applied to the Court of Session for an interdict to prevent the arbiter from acting on the ground that the respondent had lost his right to compensation by virtue of the above proviso in the "estate regulations," which provision the appellant maintained was equivalent to a stipulation that if the tenant failed to make a claim not later than one month before the termination of the tenancy he was deprived of all rights to compensation. On January 13, 1910, the Lord Ordinary (Lord Guthrie) granted the interdict asked for, but the Second Division on December 20, 1910, recalled the Lord Ordinary's interlocutor and refused an interdict on the ground that the provision in question was an illegal provision.

1911. March 21. *C. N. Johnston, K.C.*, and *A. R. Brown* (both of the Scottish Bar), for the appellant. If the decision of the Court of Session is right, then these clauses in leases compelling the tenant to give notice one month prior to leaving are void; yet there is no clause in the Acts which enacts expressly that it shall be unlawful to make an agreement as to the time within which the claim must be made. Sect. 2, sub-s. 2, is merely negative, and does not necessarily make such a stipulation unlawful; neither does s. 36 of the Act of 1883. Under the Act of 1883 (s. 7 now repealed) the tenant was not to be entitled to compensation unless he gave four months' notice at least. By the Act of 1900 the provision is that the claim "shall not be made after the determination of the tenancy." If the agreement is fair and reasonable, then the tenant is entitled to compensation only "in pursuance of the particular agreement and not under this Act." (1) And it is not denied that the stipulations as to compensation in this agreement are fair and reasonable.

(1) By s. 5 of the Agricultural Holdings (Scotland) Act, 1883, "Where, in the case of a tenancy under a lease beginning after the commencement of this Act, any particular agreement in writing secures to the tenant for any improvement specified in the third part of the schedule hereto, and executed after the commencement of this Act, fair and reasonable compensation, having regard to the circumstances existing at the time of making such agreement, then in such case the compensation in respect of such improvement shall be payable in pursuance of the particular agreement and not under this Act."

The parties could contract out of s. 2, sub-s. 2, of the Act of 1900. Two things were necessary under s. 5 of the Act of 1883. The compensation must be fair and reasonable, and secondly it must be secured by the agreement. Sects. 36 and 5 of the Act of 1883 shew that the intention of the Legislature was that in cases where the compensation was fair and reasonable the tenant's claim should be regulated not by the Act, but by the terms of the agreement taken as a whole. The argument urged against the appellant was that the agreement does not give the tenant fair and reasonable compensation where he is out of time, but that which prevented the tenant from claiming compensation was not the agreement, but his failure to comply with its conditions. The Court must look at the agreement with reference to the time when it was made. If the day after the agreement was executed the tenant had sought to have it set aside on the ground that it was contrary to s. 36, the answer would have been that the agreement was not void, for it did not deprive the tenant of his claim to compensation so long as he fulfilled the terms of his bargain. *Bell* v. *Graham* (1) has decided that whether a condition in the agreement is fair and reasonable is a question for the Court.

A. Ure, L.A. (of the Scottish Bar), and *Francis Watt*, for the respondent, were not called upon.

Lord Loreburn L.C. My Lords, in this case I think the appeal, which has been very fairly and very ably argued by both the learned counsel for the appellant, must fail. To my mind, without entering into the facts (which are agreed), the substantial meaning of the Act of Parliament is this,—I am paraphrasing the language:—You shall not by private contract deprive a tenant of his right to claim compensation under this Act, or, if you do, then your contract so far as it deprives him of such right shall be void. But there is an exception, namely, that you may by a private contract substitute a different scale of compensation for the scale of compensation provided by the Act. That is, I think, the true effect of the exception.

(1) 1908 S. C. 1060.

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Now, my Lords, in this case the lease has substituted a different scale I believe; whether it has or not is not very material, because no one complains of the scale; it is common ground, I think, in this case that the scale is a fair one. The question is, Can you add in that lease a condition as to the time within which the tenant is to claim or is to give notice of his claim? That depends upon whether the condition requiring him to give notice within a month is or is not something which deprives him of his right to claim compensation under this Act. I think it certainly does deprive him of his right, and for this reason: it says, You cannot give notice during the whole month prior to the end of the lease,—whereas the Act allows notice to be given during the whole of that month. It deprives him therefore of one month within which he would be otherwise entitled to give the notice of his claim to compensation; and therefore it deprives him of the right to claim compensation under the Act.

LORD KINNEAR. My Lords, I entirely agree with my noble and learned friend on the woolsack, and I only add that I think the last sentence of Lord Dundas's (1) opinion expresses exactly the view which I take of this case.

LORD ATKINSON. My Lords, I concur. I do not think it is necessary in this case to determine whether it is never legitimate to introduce a condition into an agreement under s. 5 of the Act. The vice of this condition, in my opinion, is that it deprives the tenant of a right which the Act has secured to him, namely, the right to assert his claim up to the last moment of his tenancy.

LORD SHAW OF DUNFERMLINE. My Lords, I do not find this case to be difficult, but I do not conceal from myself that it is important. The position of the parties to it depends upon s. 1, sub-s. 1, of the Agricultural Holdings Act of 1900. That section provides in simple language that the outgoing tenant shall "be entitled at the termination of a tenancy on quitting

(1) See post, p. 252.

his holding to obtain from the landlord as compensation under the said Acts for the improvement such sum as fairly represents the value of the improvement to an incoming tenant." That, my Lords, seems to represent the plain equity of the situation. The position taken up as a litigant by the tenant in this case is a quotation of that Act of Parliament, and he pleads that the right so conferred upon him should not be taken away. Before the determination of the tenancy and before quitting the holding he made his claim for compensation for unexhausted manures, &c., and desired arbitration upon it. This proceeding, however, was arrested by the landlord, the appellant, presenting a petition for interdict. The landlord maintains that by the lease the tenant had bound himself to another scheme of compensation requiring that the claim be lodged one month before the end of the lease. As the claim was lodged only nineteen days and not one month before that event, the appellant maintains that all right to compensation is lost.

My Lords, the history of the legislation on this subject shews that Parliament was confronted with the problem of contracting out. It was permitted, but only under the clearest conditions. Contracting out is dealt with by ss. 5 and 36 of the Act of 1883. Substantially what has been enacted is a series of provisions to prevent the confiscation by the landlord of the value of an outgoing tenant's improvements, and to secure that in all private agreements there shall be a substituted compensation.

My Lords, I have read the eleven or twelve pages of the print containing the lengthy and involved document called "Articles Regulations, and Conditions" stipulated and agreed upon under which the various farms on the estates belonging to the appellant "are to be let." This document was adopted *en bloc* in the lease. I can conceive—it requires no effort of the imagination to conceive—that a tenant attempting to master that paper might be bewildered, but it would never cross his mind that there lurked within it something which cut down or cut away his statutory rights. Such a document appears to me to fit those necessities for protection which the Act of 1883 specially provided. With regard to that Act, and especially s. 36, I cannot hold that it means anything less by way of protection than these

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two things: First, that the compensation to be substituted for the statutory compensation shall be secured to the tenant; and, secondly, that it shall be compensation on a fair and reasonable scale. My Lords, were the appellant's argument correct both of these things would disappear.

My Lords, like my noble and learned friend who has preceded me, I think that the true view of this case is clearly summed up in the last few sentences of the judgment of Lord Dundas. They are these: "The question is as to the legality or the reverse of such a provision as we have here. I think it is an illegal provision. The statutes sanction a pactional substitution of compensation in terms of agreement for compensation in terms of the Acts; but not, as I consider, the adjection of a collateral stipulation such as this, which might (at least indirectly) operate to deprive the tenant of his right to obtain any compensation at all."

I respectfully desire to adopt that language as part of my own opinion.

Had it not been, my Lords, for the judgment of the Lord Ordinary in this case, I should have held that this was an idle and oppressive action. I venture to hold that the landlord would have been well advised to rest content with the judgment of the Second Division. And I am of opinion that it is an idle and oppressive appeal, as being an unjustifiable attempt to break down that protection which the law has carefully and clearly thrown round the position of an improving tenant.

Ordered: That this appeal be dismissed with costs.

Lords' Journals, March 21, 1911.

Agents for appellant: *Martin & Co., for Skene, Edwards & Garson, W.S., Edinburgh.*

Agents for respondent: *Godden, Son & Holme, for James Purves, S.S.C., Edinburgh, & Rankin & Aitken, Stranraer.*

[HOUSE OF LORDS.]

JAMES EATON . . . . . APPELLANT;

AND

JOHN M'GREGOR BUCHANAN AND ANOTHER RESPONDENTS.

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Trustee—Compromise on Advice of Law Agent—Personal Liability of Trustee —Duty to make Annuities Real Burden on the Estate—Scottish Law.

A testator whose assets consisted of heritable and personal property used in his business by trust disposition and settlement disinherited the children of his first marriage and his daughter by his second marriage, leaving them nothing whatever, and directed his trustees to pay to his wife an annuity of 300*l.* per annum during her life, and an annuity of 200*l.* to his son John and Helen his wife during their lives, and to convey to his son George the whole residue of his estate, "but always with and under the burden of the liferent to my said wife of my properties in Glasgow and Girvan and also under burden of the payment of the annuities to my said wife and to my son and his wife."

The disinherited children upon the death of the testator threatened to take legal proceedings to set aside his disposition on the ground of want of capacity and undue influence, and also claimed to recover their legitim share of his assets.

The trustees (one of whom was the appellant), acting on the advice of a law agent of high standing and acknowledged character in the profession, compromised the claims, and borrowed the sum required to carry out the compromise on the security of the heritable estate. They also allowed the son George to take possession of the business without making the annuities to the son John and his wife primary real burdens on the heritable subjects. After a few years the business failed, and there was not sufficient to pay the annuitants :—

Held, reversing the decision of the Second Division of the Court of Session, that the appellant was not liable for breach of trust, for there was no proof that he and his co-trustees in agreeing to and carrying out the compromise had been guilty of negligence.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland, dated March 16, 1910. (1)

The facts are fully given in the judgments of Lord Atkinson and Lord Shaw of Dunfermline.

It need only be further stated that the Lord Ordinary (Lord Johnston) on July 16, 1909, held that the appellant as a trustee was

(1) See for an earlier stage of this litigation 1909 S. C. 47.

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liable personally to invest a sum that would yield an annuity of 200*l.* The appellant appealed to the Second Division, and that Court on March 16, 1910, pronounced the following interlocutor:—

"Recall the Lord Ordinary's interlocutor. Ordain the said defender to make payment in terms of the said second alternative petitory conclusion of the summons, to the pursuers of the sum of 3095*l.* sterling, with interest thereon at the rate of 5*l.* per centum per annum since 15th May, 1909; and with regard to the arrears of the annuity payable to the pursuers, ordain the said defender to make payment to the pursuers, under the first petitory conclusion of the summons relating to said annuity of the sum of 64*l.* 9*s.* and under each of the second, third and fourth conclusions relating to said annuity of the sum of 70*l.* 15*s.* in respect of each three, with interest thereon as concluded for; and decern: Find the defender liable in expenses up to 16th July, 1909."

Their Lordships, while holding the appellant liable, gave judgment for considerably less than the amount awarded by the Lord Ordinary on the ground that, had the trust been strictly administered, the respondents would not be in a better position than if 3095*l.* with interest was paid to them.

The appellant appealed from the whole interlocutor of the Second Division except that part which recalled the Lord Ordinary's interlocutor.

1911. March 6, 7. *P. O. Lawrence, K.C.*, and *Christie* (the latter of the Scottish Bar), for the appellant. The judgments in the Court below proceeded on the ground that the appellant had been guilty of gross negligence. But there was no suggestion of fraud; the appellant acted on the advice of his law agent, and if the judgment is sustained no man is safe who acts as a gratuitous trustee. The appellant is alleged first to have compromised a claim by the disinherited children of the first marriage for an extravagant amount, and secondly to have omitted to impose on the heritable property of the deceased a charge to secure the annuities, but there was here no obligation to put upon the heritage a primary real burden; the gift was a general gift. Moreover

the trustees relied on the advice of Colquhoun, the law agent, who was then in good repute.

To compromise the claim the trustees on the advice of their law agent raised the money in the only manner available, for no part of the testator's assets consisted of ready money.

Proceedings were threatened against the trustees. Under the claim for legitim the children were entitled to at least three years' valuation of the business. The annual profit was 3000*l.*, yet no account was taken of goodwill. The business had been valued at over 32,000*l.* In the 32,000*l.* there were items amounting to over 15,000*l.* which were not heritable estate. Machinery figured largely, but Robert Buchanan, an expert, classed it as movable. On the basis of these figures the children would have been entitled to one third, i.e., 5050*l.*

It was contended by the respondents that it was gross negligence for the appellant to pay 3700*l.* out of an estate of between 25,000*l.* and 40,000*l.*, but the trustees were advised that this compromise was prudent, and the matter had to be settled at once, as the children were pressing, and the only way in which the amount agreed upon could be raised was on the security of the heritable property.

As to the second question, the annuities were not intended to be a real burden on the estate. By Scotch law to impose a burden on land the intention must be expressed in the most explicit and precise manner, and the land to be burdened must be also defined: see *Williamson* v. *Begg* (1), a stronger case than this; *Tailors of Aberdeen* v. *Coutts* (2); *Kerr* v. *James* (3); *Davidson* v. *Dalziel* (4); *Cowie* v. *Muirden*. (5) In *Learoyd* v. *Whiteley* (6) it was laid down that where trustees act with ordinary care and prudence they are not responsible for loss. Here the trustees acted with prudence and on the advice of a law agent.

The true construction of the will is that the testator did not intend that a real burden should be imposed. Therefore the decision of the Court of Session was wrong and ought to be

(1) (1887) 14 R. 720, 722.
(2) (1840) 1 Rob. 296, 306, 311, 339.
(3) (1858) 20 D. 562.
(4) (1881) 8 R. 990.
(5) [1893] A. C. 674.
(6) (1887) 12 App. Cas. 727, 733.

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reversed. [They also cited the Trusts (Scotland) Act, 1867 (30 & 31 Vict. c. 97), s. 2.]

Munro, K.C. (with him *Mair*) (both of the Scottish Bar), for the respondents. The trustees to this will were guilty of gross negligence. Under the terms of the trust disposition the estate was to be conveyed to the son George Buchanan and it has never been conveyed to him, but to the lenders under the bond. Secondly, they took no steps to secure the payment of the annuities to the pursuers. Thirdly, no proper supervision was exercised over the law agent, and in particular accounts from year to year were not insisted upon. It is the duty of a trustee not merely to accept the word of a law agent, but from time to time to ask him to account. The trustees were not entitled to abstain for ten years from asking for any accounts. Fourthly, the trustees were negligent inasmuch as they took no responsibility whatever as to the management of the business. Fifthly, the trustees from 1900 to 1907 absolutely ignored the existence of this trust.

The trustees were guilty of a breach of duty in not conveying the estate to George subject to these annuities as a real burden. The word "burden" in the will must be taken to mean an effective burden. By the law of England what was meant was a real charge, and in the opinion of the judges in the Court of Session what was intended was a real burden: see *Cowie* v. *Muirden* (1), where the view taken in *Williamson* v. *Begg* (2) was not approved by Lord Watson. *Cowie* v. *Muirden* (1) shews that the word "real" in the will is not necessary to constitute a real burden. In *Tailors of Aberdeen* v. *Coutts* (3) see questions put to the Court of Session and their answer that to constitute a real burden the word "real" is not required so long as the intention is clear. Before granting a bond over the heritable subjects the trustees should have first and in front of the bond secured the annuities. The burden might have been made real by the trustees conveying to George Buchanan under the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 19. The testator is here dealing with two kinds of

(1) [1893] A. C. 674, 683; 18 R. 706. (2) (1887) 14 R. 720.
(3) 1 Rob. 296, 304, 326.

property. If the trustees had conveyed the whole estate to George Buchanan in the words of the will, then George would have made up his title to the heritage by a notarial instrument to each of the properties. Each of these must have set forth the burden of the annuities which would then enter the record, and that would have been enough to constitute the annuities real burdens on each of these properties. It is no excuse to the trustees that they were advised by a competent lawyer: *Knox* v. *Mackinnon*. (1) The evidence establishes that there was no ground whatever for the threatened action of the disinherited children for reduction of the testator's settlement. If it had been raised it was bound to be dismissed. The trustees entirely disregarded the valuation of 1900 and the fact that the legitim fund divisible could not have been more than 800*l*. In Scotland whether there is a "goodwill" is a question of circumstances. Here there was not a particle of evidence to establish as a fact that there was a "goodwill" and it was never included in any balance-sheet. As to the 1200*l*. paid to Colquhoun to enable him to pay estate duty, if there had been any inquiry for accounts the trustees would have discovered that a large part of the 1200*l*. had been fraudulently misappropriated. Trustees, although advised by a solicitor, must act on ordinary business principles: *Wyman or Ferguson* v. *Paterson*. (2)

P. O. Lawrence, K.C., in reply.

The House took time for consideration.

March 30. Lord Atkinson. My Lords, this is an appeal from an interlocutor of the Second Division of the Court of Session, dated March 16, 1910, whereby James Eaton, the appellant, one of the trustees and executors of a certain trust disposition and settlement, dated August 18, 1897, of James Buchanan, deceased, formerly fish-hook manufacturer and grain miller, of Tradeston, Glasgow, was ordered to pay to the pursuers in the action three separate sums of 3095*l*., 64*l*. 9*s*., and 70*l*. 15*s*. respectively, making together 3230*l*. 4*s*., with interest on the first mentioned sum, from May 15, 1907, till paid, at 5 per cent.

(1) (1888) 13 App. Cas. 753. (2) [1900] A. C. 271; 2 F. (H. L.) 37.

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per annum, in respect of certain breaches of the trust created by the said disposition and settlement, alleged to have been committed by the appellant.

James Buchanan died at Glasgow on September 28, 1897, aged seventy-eight years. He left him surviving his widow, Jane Buchanan, a co-trustee of the appellant; three children by his first marriage, two sons, William, his heir-at-law, and Robert, the engineering expert, living and carrying on business at Liverpool, a daughter, and certain grandchildren, issue of another daughter, named Mrs. Ramsay, who had predeceased him; and two sons, named George and John, and a daughter, issue of his second marriage. By this trust disposition he cut off all the children of his first marriage, and his daughter by his second marriage, leaving them nothing whatever. His widow, his son John, John's wife, and his son George were his sole beneficiaries.

Of the several persons appointed trustees of the aforesaid settlement all but three, namely, the appellant, a clothier carrying on business in Bridge Street, Glasgow, a friend of the deceased, Jane, widow of the deceased, and George his son, declined to accept office.

James Buchanan was admittedly a somewhat eccentric man, but he is stated to have been very strong-minded and keen and successful in business. For some time before his death he had discontinued the milling business, finding that owing to foreign competition it was no longer profitable, but from his other business, which had been long established and was at the time of his death in a flourishing condition, he derived a profit amounting to about 3000*l.* per annum.

This business was carried on in certain premises in West Street and Dale Street, Tradeston, heritable property of the deceased. His interest in it, exclusive of all the machinery, fixed or movable, erected or upon it, was valued at 6275*l.* The portion of the machinery classed by the valuator as fixed was valued at 5506*l.* 7*s.* 6*d.*, and that classed as unfixed at 462*l.* 17*s.* 6*d.*, but whether this classification was correct in law or not was not decided in the case. No evidence, indeed, was given upon which it could have been decided, and it is not disputed

that there are few questions more difficult to determine than whether machinery placed in a mill or factory has been so fixed to the freehold as to lose its character of personal property and become heritable property. It is obvious, therefore, that the amount of the testator's personal assets depended to the extent of 5306*l.* 7*s.* 6*d.* on how this point would ultimately be ruled in a Court of law.

The interest of the deceased in his other heritable property namely, No. 13, Regents Park Square, Strathbungo, and Rose Villa, 24, The Avenue, Girvan, was valued at the sums of 725*l.* and 500*l.* respectively. His account at his bankers was at the time of his death overdrawn to about 700*l.*, and it is very difficult to ascertain with accuracy what was the then entire value of his personal property, and therefore what the amount of the fund properly divisible amongst his disinherited children as their legitim. Lord Low appears to have fixed the legitim fund at 800*l.*, and therefore the amount of his clear movable assets at 2400*l.*, while Mr. Lawrence, on behalf of the appellant, contends that, exclusive of the goodwill of the business, which he puts at about 7000*l.*, the value of the movable assets must have been about 15,000*l.* But the estimate of the learned judge, which is founded on the evidence of a Mr. Ayton, the pursuers' solicitor, is obviously erroneous in this, that it does not include anything for goodwill—a most extraordinary omission—and, moreover, it is based upon the assumption that this so-called fixed machinery had become heritable property.

If this old, well-established, and profitable business had been sold or valued as a going concern, a sum of between 6000*l.* and 7000*l.*, one would think, must have been fixed for the value of the goodwill. It must have been worth something, and there is no justification, in my view, for ignoring it altogether in the estimate of the assets. It would appear to me, therefore, that the estimate adopted by the learned judge is certainly wrong to the extent of the value of the goodwill, and may be wrong, in addition, to the extent of the value placed on the fixed machinery, 5506*l.* 7*s.* 6*d.* Now such was the trust estate which the appellant had to administer. The deceased must be taken to have had confidence not only in

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the appellant's honesty, which is not impeached, but in his prudence, the soundness of his judgment, his business capacity, his fitness to deal with the assets committed to his charge and to discharge the duties of the office in which he had been placed.

The rule as to what diligence is required on the part of a trustee is in *Learoyd* v. *Whiteley* (1) laid down by Lord Watson in these words: "As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs." And Lord Blackburn in *Speight* v. *Gaunt* (2) says: "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are."

The question is, has the appellant in this case fallen short of that standard; and, if so, have the respondents been damnified by that default, and to what amount, if any? In many respects he has done all that was required of him. It is unnecessary to deal with these instances. He had the misfortune to continue as his law agent for the purposes of the trust the confidential law agent of the deceased, a Mr. James Colquhoun, a man then of high standing and acknowledged character in his profession, but who subsequently proved to be an unscrupulous and accomplished knave. As an example of the manner and the spirit in which things have been pushed against the appellant to shew that he was negligent in the discharge of his duties as a trustee, it is contended that, the deceased having in his presence, and that of Colquhoun, stated that there were no bonds on any of his property as he had given Colquhoun some time before money to pay off the last remaining bond, and asked Colquhoun if this was not so, to which the latter assented, the appellant should have examined into this past transaction between the deceased and his solicitor which took place before his appointment as trustee at all, and should have obtained inspection of Colquhoun's ledger, when he would have ascertained what was subsequently discovered, that Colquhoun had not paid the money entrusted to him, but had appropriated it to his own purposes. That contention is, I think, utterly unsustainable; and, besides, it is admitted

(1) (1887) 12 App. Cas. 727, 733. (2) (1883) 9 App. Cas. 1, 20.

that even if the appellant has, in this instance, been negligent, the pursuers have not sustained any loss by his default.

Another matter of a somewhat similar character was treated as a loss for which the appellant was made responsible.

George Buchanan, the residuary legatee, was authorized by the trustees to obtain, on their behalf, a credit from his bankers to the extent of 2000*l.* By virtue of this authority he obtained and handed over to Colquhoun a sum of 1200*l.* to pay estate duty. For this sum the latter accounts in a letter dated May 28, 1898, which ran as follows:—

"George Buchanan, Esq.,
Dale Street, Tradeston.

"20th May, 1898.

"Buchanan's Trust.

"Dear Sir,—We have your favour of to-day, and, as requested, beg to say that of the £1,200 received by us towards the inventory and estate duty, there has been applied in payment of

duty	£633	17	9
and we have repaid you	500	0	0
making together the sum of	£1133	17	9

and leaving £66 2*s.* 3*d.* in our hands towards expenses of trust.—

"Yours truly,
"J. & D. T. Colquhoun."

In point of fact, Colquhoun, though he did repay the 500*l.* to George, did not apply the sum of 633*l.* 17*s.* 9*d.* in payment of the estate duty at all. He appropriated it to his own use, but there is no proof whatever that George Buchanan did not repay to the bank the sum so advanced to him. If so, the estate of the deceased has lost nothing by Colquhoun's fraud, since the estate duty should, in any event, be paid out of the assets. But even if it were otherwise, I fail to see how entrusting or causing to be entrusted a law agent of good repute with money to pay estate duty is an act of negligence on the part of a trustee, for any loss resulting from which he should be made personally responsible. It is quite true that it has been decided that if a trustee chooses to convert his solicitor into his banker, and leave trust funds in that solicitor's hands, he will be responsible if the solicitor

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should fraudulently misappropriate them, but putting a solicitor in funds to pay estate duty is quite a different thing. Indeed, it would appear to me to be one of the things which the solicitors of executors or of trustees are, in the ordinary course of business, frequently entrusted to do. And if so, according to the judgment of Lord Blackburn already quoted, a trustee so acting should not be held blamable. The estate duty not having been paid, it was necessary to raise, by mortgage of the heritable property, a sum of 800*l.* in order to pay it. It does not appear to me that it was at all possible, under these circumstances, to hold the appellant personally liable for this sum as it was contended he should be held.

The two, and the only two, points of substance in the case remain to be dealt with. James Buchanan, by his above-mentioned disposition, directed his trustees to pay to his wife an annuity of 300*l.* per annum during her life. He also directed them to pay to his son John and Helen his wife, and the survivor of them, during their lives, an annuity of 200*l.* per annum at such dates and by such instalments as they the trustees should think proper. He further directed them in the seventh place in the words following: "As soon as convenient after my decease to assign, dispone, convey, and make over to and in favour of my son, George Buchanan, the whole residue of my means and estate, heritable and movable, real and personal, including my several businesses, but that always with and under the burden of the liferent before mentioned to my said wife of my properties in Glasgow and Girvan, and also under burden of the payment of the before-mentioned annuities to my said wife and to my son John and his wife: Declaring that until the transfer of my businesses to my son George, I request my son William to assist George in the carrying on of my said businesses, and I authorise my trustees to pay to my said son William during such period as he may give such assistance a salary at the rate of 500*l.* per annum."

It is now doubtful, owing to the fact that Colquhoun's papers were made away with, whether the trustees ever conveyed this residue to George Buchanan. Deeds of some kind were executed, but what was their nature has not been shewn, and it must, I think,

be taken, for the purposes of this case, that no such conveyance or assignment was ever executed. The trustees, however, allowed George Buchanan to undertake immediately the management of the business. That, as appears from the language above quoted, was according to the intention of the deceased. They further permitted him to continue to manage the business up to the year 1907, when he became bankrupt. At first he managed it with success, realizing considerable profits. The profits, however, soon and speedily dwindled, and ultimately, for want of capital, it is alleged, the concern became insolvent. During these nine years, however, George Buchanan paid to the respondent the annuity of 200*l.* per annum.

Robert Buchanan, irritated no doubt by the way in which he and his sisters by the first marriage, as well as the children of his deceased sister, Mrs. Ramsay, had been treated by his father, immediately after the latter's death threatened to institute legal proceedings on their behalf as well as his own, with a view first to have the disposition by his father of his property set aside on the ground of want of disposing capacity and of undue influence exercised upon him by George Buchanan, and secondly to recover their legitim share of the father's assets. It is clear from the evidence of the appellant, whose truthfulness like his honesty is not impeached, that he was fully aware that this latter question involved two others which Robert designed and intended to raise, namely, first the knotty question, on which Robert was supposed to be an expert, whether the so-called fixed machinery had in contemplation of law become heritable property or not, and second, the question whether, in estimating the amount of the personal assets of the deceased, a value should not be put upon the goodwill of the business.

It is quite true that the appellant and his legal adviser, Mr. Colquhoun, when this threat was made believed, in fact were confident, that the deceased was a man of sound mind at the time he made the impeached disposition of his property, and quite capable of making it.

It is, I think, equally clear that, on the evidence, neither of them believed that any undue influence had in fact been exercised upon the deceased, or that, if such an attempt had been

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made to exercise it, he would have yielded to it; but there is no evidence whatever to shew that they did not believe, or ought not to have concluded, that, at the time the threat was made, it was not a real threat, or that Robert was not in earnest, and did not intend to carry out his threat and institute these proceedings.

As far as the claim for legitim, as well as the mode in which the amount of the personal assets were to be ascertained, are concerned it was necessarily a real threat. As to these matters, at all events, the appellant and Colquhoun must, as reasonable men, have concluded that Robert Buchanan, to use a popular phrase, "meant business." And, unless they were not only insensible to human feelings, and ignorant of the practice of Courts, the appellant and his adviser must have been fully conscious that, should a suit be instituted to impeach this settlement, the sympathies, at all events, of any jury the case came before would most probably be excited strongly in favour of the disinherited children of the deceased, who, to use the words of Lord Johnston, he had treated "so scurvily."

The appellant, his co-trustees, and the legal adviser had before them valuations of this machinery and of the heritable property of the deceased, made by valuators whose competence and honesty are not impeached.

The question of a compromise of Robert Buchanan's claims was considered, discussed, and approved of by all of them and ultimately carried out. The appellant in the following part of his evidence details with transparent honesty and perfect frankness the advice he received from his legal adviser, who he absolutely trusted, the motives which actuated him, the objects he desired to effect.

At page 57 of the record, referring to the compromise, he says, "(A.) The first I heard of that was at a meeting, when Mr. Colquhoun told me that he had discussed the matter with George Buchanan, and he had agreed to give 800*l.* each. I thought from what had passed between us before that, that was more than we had considered before. Mr. Colquhoun said, 'You cannot do anything else, you cannot get out of it.' I expressed surprise, and I was surprised that George should have

agreed to that sum. On the other hand, George was the residuary legatee, and Mrs. Buchanan was the principal annuitant, and Mr. Colquhoun was in favour of it. Mr. Colquhoun said that if we went into litigation it would cost us far more. He said that he believed that we would gain the case if we went into litigation, because we could prove that Mr. Buchanan, although he had some peculiarities, was perfectly sane, and was a strong-minded man. He never met a stronger minded man. Mr. Colquhoun said that even although we won our case it would cost us something, and after we were done with it we would still have to face the legitim, and the difficulty of deciding what was movable and what was heritable. (Q.) Are you clear that that question of deciding what was movable and what was heritable was raised by Mr. Colquhoun at that time? (A.) Yes, I am perfectly clear about that. (Q.) Was anything said as to the method by which that would require to be settled? (A.) No."

On page 59 he states that he was led to believe that they would have to get machinery experts to meet Robert; that it would cost a great deal, and that by paying this sum they would square the whole matter, and let the trust go on; that they considered it the interest of all parties to effect this compromise; that they all had agreed to it except John.

Again, lower down, he says, "I considered that, supposing the money paid out was a little more than the legitim, still we were safer to do that than to run the risk of all the trouble and worry of litigation." On the next page he states that he was greatly swayed by the opinion Mr. Colquhoun had expressed that he thought at the time ample would remain to meet the annuities, and that, therefore, it was a matter which chiefly concerned George Buchanan; that nobody could have foreseen the depreciation of the property which occurred in the succeeding ten years; that he had gone over with Colquhoun the inventory prepared for the payment of estate duty in which the value of the estate was brought out at from 23,000*l.* to 24,000*l.*; that he thought the estate was valued for much more than this, and considered that they had done the best for all parties concerned. On cross-examination he stated, "We paid that sum of money

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to prevent all that and to square these different things, viz., the action for reduction, the legitim, and to save us going into the question of the value of the goodwill."

The evidence of Colquhoun at page 43 of the record is in substantial agreement with that of the appellant. He says he, on a very strict scrutiny, thought the estate might give 3800*l.* for legitim alone; that he advised a settlement for that sum; "that his strong opinion was that it would have been exceedingly foolish on the part of the trustees, and especially of George, not to have settled the matter on the terms proposed, because he thought it was a very favourable settlement, in view of the determination which had been expressed to take the matter into Court." There was no risk, he thought, of the action being lost, but there would have been the expense and exposure, and it would have been very painful to have had Mr. Buchanan's condition a subject of controversy before a jury to institute an action of reduction.

Robert Buchanan does not deny that he threatened to institute an action for reduction of his father's will or settlement; nor does he venture to state that, at the time he made the threat, he gave any intimation that he did not intend to carry it out, though, at the trial, he did say he challenged the will from irritation caused by its unfairness. That is a very different thing, however, from saying he did not intend to proceed. He says he treated the machinery as movable property, on that basis estimated his father's personalty at from 12,000*l.* to 14,000*l.*, and compromised on the terms of receiving 800*l.* for each of the children for whom he was acting, and 500*l.* for Mrs. Ramsay, she having already got 500*l.* from her father, and that he, from his knowledge of his father's estate, thought this was a very small sum to accept. This compromise was carried out by an agreement in writing signed by all the parties interested.

It is contended that the appellant was guilty of negligence in consenting to it. He may have overestimated, to some extent, the amount of James Buchanan's personalty. He may have omitted to take some steps in the transaction with sufficient formality, or to have fortified himself sufficiently with numerous, and possibly conflicting, valuations of experts, or audits of

accounts, but it certainly would appear to me that he dealt with this matter of the compromise, advised as he was, with the common sense, shrewdness, and sagacity of a practical man of business. The deceased knew him well. It is not suggested that the appellant did not act honestly, according to the best of his judgment. It was on that judgment James Buchanan relied. Much weight must therefore be given to this man's decision. It may be that looking back now at all the facts one might think that some other course would have been wiser than that which he took, but that is not enough. I confess I am utterly unable to see that the appellant in agreeing to this compromise acted otherwise than a man of ordinary prudence might be expected to act in the reasonable management of his own private affairs, provided always that he was in a position to procure the money necessary to enable him to carry out the agreement into which he had entered. It is only necessary to look at the balance-sheets and valuations, which were given in evidence, to see that the requisite money could only be procured by the trustees selling, under the powers conferred by the settlement upon them, this business as a going concern, a course which would manifestly have defeated the intention of the settlor, and have been most injurious to the interests of all the parties concerned, or by exercising the other power also conferred upon them, namely, the power to borrow upon the security of the trust estate or any part of it. They exercised the latter power, and borrowed upon mortgage of the heritable property, the only security they really had to give, a sum of 4000*l.* from the University of Glasgow.

This has, I understand, been held to be a good and valid charge. It is in front of the annuities. The property has vastly deteriorated. The mortgagees have sold with the result, that only enough has been realized to satisfy the mortgage debt, and nothing now remains to meet the annuity payable to the respondents. One must have sympathy for them.

The Court of Session held that the appellant was guilty of negligence and a breach of trust in not having taken steps to secure the payment of the annuities in priority to any sum he might borrow for the purpose of carrying out the compromise.

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If the annuities were, by the words of the seventh clause of the will, read with the context, made a real burden on the heritable property of the settlor, that decision would, in my opinion, have been right, and the appellant would be bound to compensate the respondents for the loss they have sustained by reason of his neglect to do this; but if the annuities were not, by those words, made a real burden on that property, then the appellant would by this omission have violated no duty, having been guilty of no breach of trust. This is, I think, clear from the judgments of Lords Watson and Shand in the case of *Cowie* v. *Muirden* (1), decided in your Lordships' House. The serious and much debated question then is, do the words of this clause, taken with the other clauses in the settlement, constitute these annuities a real burden, within the meaning of the Scotch law, on the heritable property of James Buchanan, or indicate an intention on the latter's part that they should be such a burden?

In my view, having regard, in addition to the decision in the case already cited, to the decisions in the two following cases, namely, *Tailors of Aberdeen* v. *Coutts* (2), and *Williamson* v. *Begg* (3), in which the words were much stronger than in the present case, the answer to that question must be in the negative.

I am, therefore, unable to concur in the view taken by the learned judges of the Court of Session. With the utmost respect to them, I think that, judged by the established rule and standard, the appellant did not fail in his duty in any respect, that he was not negligent, and that the decision finding him to have been so was erroneous and should be reversed, and the appeal allowed with costs.

Earl of Halsbury concurred.

Lord Shaw of Dunfermline. My Lords, the late Mr. James Buchanan, who died in September, 1897, left a trust disposition and settlement, under which he conveyed his whole estate to certain trustees. Three of these accepted, namely, the present appellant, Mr. Eaton, and the testator's widow, Mrs. Buchanan,

(1) [1893] A. C. 674; 20 R. (H. L.) 81, 86, 87.
(2) 1 Rob. 296, 306, 307. (3) 14 R. 720, 722.

and his son, George Buchanan. These trustees were defenders in the present suit. For reasons which are apparent in the brief narrative which follows, the widow and son did not defend the action, and it is clear that the brunt of any decree obtained by the pursuer would have to be borne by the appearing appellant, Mr. Eaton. That gentleman was a clothier in Glasgow, and a friend of long standing of the testator. Mr. Buchanan died at the age of seventy-eight, and shortly after the execution of the settlement.

By the third purpose of that deed the trustees were directed to allow Mrs. Buchanan the life-rent of certain properties of the testator in Glasgow and Girvan. By the fifth purpose they were directed to allow the widow an annuity for life of 300*l.* sterling per annum. By the sixth purpose they were directed to pay to the testator's son, John Macgregor Buchanan, and his wife, or the survivor of them, an annuity of 200*l.* sterling "at such dates and by such instalments as my trustees shall think proper." The question which is raised in this case bears upon the rights of the annuitants, John Macgregor and his wife, who bring the present suit, and have raised the points which have given rise to the very fully considered judgments of the Courts below. Substantially the case is that the interests of John Macgregor Buchanan and his wife as annuitants have been improperly sacrificed by what amounts to maladministration upon the part of the trustees. And it is said that they have illegally parted with the residue of the estate without securing the annuity out of the heritable portion thereof. The pleadings are long, but that is the real case which is made. The residue of the estate was dealt with by the seventh purpose of the trust in this language: "As soon as convenient after my decease I direct and appoint my trustees to assign, dispone, convey, and make over to and in favour of my son George Buchanan the whole residue of my lands and estate, heritable and movable, real and personal, including my several businesses, but that always with and under the burden of the liferent before mentioned to my said wife of my properties in Glasgow and Girvan, and also under the burden of the payment of the before-mentioned annuities to my said wife and to my son John and his wife." It was declared that the

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provisions in favour of wife and children were to be in full of all claims and demands "competent to them by and through my death as terce, jus relictae, legitim, or otherwise." A further declaration was made in these terms: "It is my intention that my sons William Buchanan and Robert Buchanan, and my daughters Mary Buchanan or McDougall, and Jane Buchanan or Trill, shall have no right to any share of my estates." This clause constituted a plain disinherison of these children. Three of them, namely, William, Robert, and Mrs. Trill, had been children of a first wife; the fourth, Mrs. McDougall, was a daughter of the second marriage. They all survived the testator. The law of Scotland, however, beneficially interposes in such a case by granting the disinherited children a right of legitim out of the movable estate. This claim is a claim of debt against the estate and pro tanto defeats the disinheriting will. Mrs. Ramsay, another child of the first marriage, had predeceased her father, leaving five children. Unfortunately, however, for the Ramsay children, there is not representation in regard to the right of legitim, and they accordingly not only took nothing under the will, but had not even the right of legitim which their parent, Mrs. Ramsay, would have had had she survived the testator. George Buchanan obtained the whole of the residue; John Macgregor Buchanan obtained his annuity of 200*l.*, and none of the other issue were provided for.

In these circumstances, it appears that at the very first meeting of the trustees explanations were demanded as to the claim for legitim open to the children of the deceased who were excluded by the settlement. Another and more serious intimation was immediately thereafter made. The validity of the settlement was challenged, by children and grandchildren alike, on the double ground of it not being the testator's deed, owing to his lack of mental capacity, and of his having been induced to enter into it by those benefiting by it.

By the Trusts (Scotland) Act, 1867, s. 2, sub-s. 5, trustees are empowered "to compromise, or to submit, and refer all claims connected with the trust estate." The claims by the disinherited issue were in point of fact compromised by an agreement, under which 3700*l.* was struck as a reasonable payment to be made to

them in full of all their rights, whether under the head of legitim or as heirs ab intestato. The children and grandchildren accepted this payment, and, on their part by the agreement, they proceeded to "renounce and give up all objections which they have taken to the validity of the said trust" deed, and they ratified and approved of the trust settlement, and agreed never to quarrel or impugn it. This compromise is attacked in the suit.

The action was raised about ten years after the agreement and the payments under it were made. The grounds of attack are (1.) that the amount of the payment was extravagant; and (2.) that the manner in which it was effected, namely, by borrowing on the heritable property, with the consent of the residuary owner, George Buchanan, constituted an illegal prejudice of the annuitants' rights.

In regard to the first point, the trustees, the widow, and the whole family, except the annuitant John, assented to the arrangement as reasonable. Both in the Outer and in the Inner House, however, the learned judges have decided that the payment was on a scale so extravagant as to amount to misfeasance by the trustees.

My Lords, I examine the case without reference at present to the claim for reduction of the deed, but with regard to the payment of legitim alone. As I have said, that was a payment which could not be avoided. It was not, like the other head of claim, the threat of an action; it was, according to the law of Scotland, the tabling of a debt, and a debt of such a nature that it must be discharged in preference to any rights under the deceased's settlement. It is accordingly cardinal to consider what was the gross amount of movable estate, one third of which would constitute the legitim fund to be payable under this demand. My Lords, I regret to observe that considerable portions of the judgments of the Court below are taken up with the history of Mr. George Buchanan, of his law agent, and of the business subsequent to the date when the settlement was arranged. In attacking, however, a compromise come to by the agreement of November and December, 1898, and March, 1899, the Court is, in my humble judgment, bound to consider the

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situation of parties and the state of accounts as they had then developed, so as, if possible, to put itself in the position of the contracting parties, and ascertain from that point of view whether the conduct was reasonable or the reverse.

That the late Mr. Buchanan had enjoyed from his businesses a large income appears to be beyond question. It is variously stated at from 3000*l.* to 5000*l.* per annum. In the year subsequent to his death the business continued to yield between 2000*l.* and 3000*l.* It partly consisted of a hook factory and partly of flour and gristing mills. In the business balance-sheet as of June 30, 1897, Mr. Buchanan's balance at credit amounted to 32,358*l.* An inventory and valuation of the estate was prepared by Mr. James Colquhoun, who had been Mr. Buchanan's agent and was agent in the trust, and the total amount of estate appears to have been between 26,000*l.* and 28,000*l.* Mr. James Colquhoun, the trust solicitor, was subsequently convicted of embezzlement, and out of the confusion with regard to his papers and affairs that draft inventory has not emerged. Of the gross estate, however, it is admitted that by far the largest proportion was the value of the heritable properties, and indeed the nearest estimate that one can get as to the net value of the movable estate is derived unsatisfactorily from an estimate made by Mr. James Colquhoun that of the sum paid in compromise one half, namely, 1850*l.*, would have been the estimate of the legitim due to the claimants. That is to say, the whole movable estate was treated by him as of the value of three times that figure, namely, 5550*l.*

It is at this point, my Lords, that I have come to be of the opinion that a serious error has been made in the Courts below as to the amount of the movable estate. I do not myself entertain any doubt that had the legitim had to be sued for and an account taken, the personal estate would have appeared at a considerably larger figure. In my view it is clear that differences of opinion—working out to thousands of pounds sterling—existed amongst those interested; and a priori a compromise of some kind would appear to have been wise. One item in particular was the subject of serious dispute between the parties in the year 1898. In so far as the mill and factory machinery were

concerned, the trustees founded upon a valuation by Mr. Norman, which treated 5306*l.* as the value of the "fixed plant," and only 462*l.* as the value of the "movable plant." Mr. Robert Buchanan, knowing the mill, &c., was of opinion that any such estimate was wholly wrong. It is, as your Lordships are aware, a matter of no little difficulty in many cases to settle the bounds of heritable and movable in this particular. It is not surprising, accordingly, that there was controversy on this matter of fact. Mr. Robert Buchanan states that, in his opinion, there was at least 12,000*l.* to 14,000*l.* of what he considered movable estate, "that is to say, stock-in-trade, debts, and movable machinery," and he says plainly in his evidence that it was on that basis that he was claiming legitim. On the lower of these figures, the legitim fund would have been 4000*l.*

But in the second place, my Lords, neither in the inventory nor in Mr. Colquhoun's calculations was anything put down for the goodwill of the business. It is at least highly probable that in any action of accounting this item would have formed a subject of keen discussion and estimate. Upon this subject we have not the advantage of knowing what were the views of the Court below, and the learned counsel for the respondent in his able argument candidly conceded that the item of goodwill had not been included, and that he was unable to give assistance as to its value. Assuming, however, a very moderate allowance of only one year's profits to be given, a sum of 3000*l.* would be added to the total of the movable estate. The legitim fund would thus have been increased by another 1000*l.*, and would have amounted to 5000*l.* A settlement was made for 3700*l.* My Lords, upon these figures the suggestion that the settlement, even had it concerned the claim of legitim alone, was extravagant to the point of misfeasance would appear to me to be completely confuted. But when I consider that the compromise included the claims of the grandchildren, and the setting at rest a challenge of the trust deed and obtaining a ratification of that document, I can only say that the whole transaction appears to me as an entirely sensible family arrangement.

I say so, repeating that I think it illegitimate in judging of the conduct of trustees at a certain date to take into account the

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history of a commercial concern in subsequent years and in other hands, or the defalcations or delinquencies of a law adviser subsequently committed. I am unable, for these reasons, to concur with the major portion of the observations and reasoning of the judges in the Courts below.

I think, my Lords, that this result is entirely in accordance with sound principle. In Scotland much value has, for many generations, been attached to the private administration of trusts. It is the duty of Courts of law to enforce these, and the performance of the duty resting upon those who take office as trustees. This is the cardinal and constant rule. But I do not think that this ought to, or can with propriety, be done by setting up a standard of duty higher or more rigorous than those which prevail in the transaction of business amongst straight-dealing and honourable men. Were such a standard insisted upon, I doubt whether it would be possible to maintain the system of voluntary trusts in my country. The trusts are undertaken in the great majority of cases simply out of respect for the memory and wishes of a friend, and they are performed with no reward, except the consciousness of duty done towards his family or the other beneficiaries under his will. It would not appear to me to be any part of our trust law to visit the person so acting, and in many cases performing what are irksome as well as responsible tasks, with personal liability, unless there has been either such neglect or such a departure from ordinary business standards as would fall to be condemned in ordinary life.

Nor, my Lords, do I find any departure in the above from authority. In *Whiteley* v. *Learoyd* (1) Lord Halsbury L.C. said: "I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of a particular trustee. Persons who accept that office must be supposed to accept it with responsibility at all events for the possession of ordinary care and prudence"; and the true question in such cases is, in the language of Lord Herschell in *Rae* v. *Meek* (2), "Has it then been shewn that the trustee failed to exercise that degree of

(1) 12 App. Cas. at p. 731.
(2) (1889) 14 App. Cas. 558, 570; 16 R. (H. L.) 34.

diligence which a man of ordinary prudence would exercise in the management of his own affairs?" These citations are recognized by the late Lord M'Laren in his work on Wills and Settlements, p. 1205, as applying the true test. And of this he says: "It is indeed the only practicable test of prudent management, and it is one to which no honest and capable trustee need object as a standard by which his administration should be tried."

In the view which I have taken, the compromise made by Mr. Eaton and his co-trustees was a sound compromise on its merits and is entirely defensible in law. But, while it may have been so on its merits, it is said that the transaction was carried through in a manner which violated the legal rights of the annuitants, which rights the trustees were bound to protect. If this be made out, a breach of trust will be established and the defender will be responsible.

The position of the estate was that George Buchanan, the eldest son of the testator's second marriage, was sole residuary legatee, subject to the following burdens:—First, the life-rent of two properties to his mother, and, secondly, the annuity of 300*l.* to his mother (this not being now in question, she having herself been a party to the whole transactions), and of 200*l.* to his brother John and his wife or survivor. The businesses were continued to be carried on by George and in the old premises. To settle with the beneficiaries, even for their legitim, by demanding payment from George, would have crippled him in business. What was done, accordingly, was to raise the needful sum for the payment by granting a bond for 4000*l.* over the heritable estates, destined as part of the residue to George. It is maintained that this bond, which, of course, entered the records, was a transaction which, as events have proved, after twelve years have elapsed and the value both of businesses and properties have gone down, imperilled the annuitants' legal rights. It is accordingly vital to ascertain what these rights were. The position of the annuitant John is, that before granting a bond over the heritable property the trustees should have first, and in front of the bond, secured the annuity upon the records as a real burden upon the lands.

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The right of an annuitant to have his annuity made a real burden upon heritable subjects depends upon the language employed in the dispositive instrument. Since the case of *Tailors of Aberdeen* v. *Coutts* (1) it cannot be doubted that the employment of the term "real burden" in the sense of a vox signata is not required if language of an equivalent character is employed, as, for instance, if it be stipulated and declared that the burden is, during its currency, to enter the records and be inserted in all future transmissions or instruments of the lands. But what is required is that either by the use of the term itself or by some express words, or by clear implication, the heritable subject itself must be affected. It is the settled law of Scotland that nothing less than this will suffice. The question accordingly is whether the language employed in Mr. Buchanan's settlement was sufficient either to create or to direct the creation of a real burden upon the properties.

The case of *Williamson* v. *Begg* (2) was founded upon at your Lordships' Bar. Upon which I observe that I do not think in future it will ever be safe to cite the case of *Williamson* v. *Begg* (2), except along with the interpretation of that decision by the language of the learned judges in the case of *Cowie* v. *Muirden*. (3) In *Cowie's Case* (3) the testator had made a disposition of his whole estate under certain burdens. These were, however, expressly "declared to be real burdens on the estate and effects hereby conveyed," and this declaration occurred in the dispositive clause of the deed. No separate description of the heritable properties was contained in the deed, but, by virtue of the provisions of the Titles to Land Act, 1868, a title was made out to the several portions by a notarial instrument which effectually connected the beneficiary's title with that last recorded, and so feudalized his right. It was held that an annuity in favour of the daughter of the testator had been effectively constituted a real burden upon the lands. The language as to the creation of the burden as a real burden was, in *Cowie's Case* (3), express, and occurred at the appropriate part of the deed. In *Williamson's Case* (2) the words "real burden" were used, but, as the judgment was

(1) 1 Rob. 296, 306.
(2) (1887) 14 R. 720.
(3) [1893] A. C. 674; 20 R. (H. L.) 81.

interpreted, in an inappropriate part of it. In the case of the present deed the words do not occur at all.

The Lord Chancellor (Lord Herschell) said (1): "In *Williamson* v. *Begg* (2) the words which purported to declare that these obligations should be real burdens were not contained in the dispositive clause, and it was, of course, incumbent upon the pursuer in that case to make out that if the defender" (who was the law agent in the trust) "had done his duty, the result would have been to create this obligation a real burden. He failed, to my mind, to establish any such duty." So also Lord Watson: "In *Williamson* v. *Begg* (2) the annuity was not in apt terms made a real burden by the general conveyance. . . . . The disponee was, therefore, under no obligation to convert into a real, that which its author had only made a personal, burden." The judgment of Lord Shand is of this importance, that he was one of the judges in *Williamson* v. *Begg*. (2) His Lordship said: "The deed contained no term of obligation on the general disponee to constitute a real burden, and no condition that by acceptance of its benefits he should become bound to do so, and my opinion was and is that in these circumstances the mere ineffectual attempt by the testator to create the real burden did not infer such an obligation."

My Lords, standing that judgment, and having in view the fact that the annuities here are not in terms created real burdens, nor are there any terms of an equivalent character occurring in any portion of the trust deed, it appears to me to be clear that there was and is no obligation upon the trustees of the late Mr. James Buchanan to convert these annuities into a real burden upon the residuary heritable estate. When, accordingly, that heritable estate was mortgaged for the sums required for the compromise, and this was done with the consent of Mr. George Buchanan, it does not appear to me that the transaction could have been made the subject of interdict at the instance of the annuitants, on the plea that they had the first charge upon the property. The burden of the annuities fell upon the residuary legatee as a personal burden, and it was not a part of the duty of the trustees to treat it as, or make it, a real burden on

(1) [1893] A. C. 674, 681, 684, 688. (2) 14 R. 720.

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the lands. The case, accordingly, of malfeasance on this head also fails.

My Lords, in view of certain observations which occur in the opinion of the learned Lord Ordinary as to the defender, I think it just to Mr. Eaton to say that, in my humble judgment, concurring, as I understand it to do, with the judgment of all your Lordships, he stands entirely acquitted of the charges brought against him—either against his business capacity or his integrity. I think him entitled to be absolved from the conclusions of the action.

LORD LOREBURN L.C. concurred.

Ordered that the interlocutor so far as appealed from be reversed; that the cause be remitted to the Court of Session to do therein as shall be just and consistent with this judgment. And it is further ordered that the respondents do pay the appellant his costs in the Courts below and in this House.

Lords' Journals, March 30, 1911.

Agents for appellant: *Wilde, Moore, Wigston & Co., for R. & R. Denholm & Kerr, Solicitors, Edinburgh.*

Agent for respondents: *John Kennedy, W.S., for James Ayton, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

INTERNATIONAL SPONGE IMPORTERS, LIMITED . . . . . } Appellants;

AND

ANDREW WATT & SONS . . . . . Respondents.

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Sale of Goods—Agent—Authority of Agent to receive Payment in Cash—Directions as to Payment by crossed Cheque and Form of Receipt.

The appellants, sponge importers, employed a traveller to carry with him for sale parcels of sponges. When a bargain was concluded it was the duty of the traveller to forward to the appellants a sale sheet containing particulars of the transaction. The appellants then forwarded to the customer an invoice recording the transaction, which was followed monthly by a statement of account. The statement of account contained three printed notices to customers—first, "Cheques to be crossed"; second, "All cheques to be made payable to International Sponge Importers"; and third, "No receipt valid unless on the firm's printed form to be attached hereto." The respondents had for some years dealt with the appellants on this system. In 1905, 1907, and 1908 the traveller sold three parcels of sponges to the respondents. In the first and second transactions he induced the respondents to pay for the sponges by a cheque payable to him. On the third occasion they paid him 120*l.* in notes and gold. The traveller, who had no actual authority to receive in payment of sponges anything except crossed cheques in favour of the appellants, fraudulently appropriated the amount of the payments made to him by the respondents:—

Held, affirming the decision of the Second Division of the Court of Session, that the payments to the traveller were valid as against the appellants, for the notices in the statements of account did not contain a sufficient intimation to their customers that the traveller was not authorized to receive payment for goods delivered in cash or in a cheque in his favour which could be cashed at once.

Appeal from a decision of the Second Division of the Court of Session, Scotland.

The appellants, the International Sponge Importers, London, which was a company formed of all the large sponge importing firms, raised this action against the respondents, Messrs. Andrew Watt & Sons, saddlers, Edinburgh. In their summons the appellants sought an order compelling the respondents to deliver to them three consignments of sponges, consisting of,

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first, 400 fine Turkey stable sponges; second, 270 ditto; and third, 740 ditto or otherwise, and failing such delivery to pay to the appellants the sum of 314*l.* 15*s.* 10*d.*, the value thereof, together with legal interest. But at the Bar the appellants limited their claim to payment of 254*l.*, the sum the respondents paid the appellants' traveller for the three parcels of sponges.

The appellants' business consisted in the importation of sponges for sale. The respondents had been regular customers of the appellants or of their predecessors since 1898. For the purpose of carrying on their business the appellants employed a number of travellers to take with them on their journey cases of sponges for which they expected to get customers. Sponges could not be sold by sample, a parcel had to be taken. When a bargain was concluded it was the duty of the traveller to forward to the appellants a sale sheet containing particulars of the transaction, the name of the customer, the quantity of goods taken, and the price agreed on. The appellants then forwarded to the customer an invoice recording the transaction. At the end of each month following the transaction a statement of account would be sent by the appellants, and the appellants alleged that it was upon this statement of account that payment was made. These statements of account all contained at least three express intimations to customers as the conditions on which business would be done, each of which was printed, sometimes in black, sometimes in red ink, on the statement of account. The first intimation was:

"Terms 2½ per cent. disc. for prompt cash, or three months net. Cheques to be crossed 'London and Joint Stock Bank'—account payees." Or, "Terms strictly net. Cheques to be crossed 'National Provincial Bank of England account payees.'" Or, "Strictly net. All cheques to be made payable to International Sponge Importers, Limited, Cresswell Brothers' branch, and crossed 'National Provincial Bank of England account of payees only.'"

Cresswell Brothers was a branch of the appellants' firm.

The second intimation was, "No receipt valid unless on the firm's printed form to be attached hereto"; the third, "When remitting please return this statement." The appellants alleged

that, with the exception of the three transactions invalid in this case (and one other transaction discovered after the action was raised), all transactions between appellants and respondents—and they were numerous—were carried though upon this system, and payment was made by cheque drawn in favour of the appellants.

The first fraudulent transaction took place on October 20, 1905. On that day the appellants' traveller Henry or Harry Cohen called, as was his custom, on the respondents in Edinburgh and induced them to purchase 400 sponges at the price of 4*s.* each, the total being 80*l.* Cohen induced the respondents to pay him the said sum on the spot by cheque drawn in his favour which was not crossed. Cohen gave a receipt for the 80*l.* written on a sheet of the ordinary writing paper of the North British Railway Station Hotel, Edinburgh, giving as explanation that he had just come through from Glasgow with the sponges and had not his stationery case and forms with him. In his evidence Mr. Watt, of the respondents' firm, explained that eighteen months before this transaction, namely, in February, 1904, they had a cash transaction with Cohen, when they purchased 155 sponges for 31*l.*; that the appellants had notice of the cash payment and never called it in question. Mr. Watt further explained that he never had his attention drawn to the notice in red ink upon the statement of account as to the form of receipt, and that so far as his knowledge went no such notice appeared on the invoice; that his recollection of the transaction in October, 1905, was that Cohen told him that he had two cases of sponges he had received from a firm in Glasgow who were unable to meet their liabilities to the appellants; that Cohen also said he had made an arrangement with the Glasgow firm to take the sponges back at a price lower than the one the firm had paid for them; that the price was fixed on the basis of it being a cash one; that, further, in April, 1906, the respondents' called the appellants' attention to the fact that they had included the transaction in their account and that they had no invoice for it, and to that communication the respondents received no answer.

The second transaction took place on October 8, 1907. On that day Cohen also called on the respondents in Edinburgh and under somewhat similar circumstances induced them to

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purchase 270 Turkey sponges at 4*s.* each, amounting altogether to 54*l.* In this case also the respondents paid him the amount by cheque drawn in Cohen's favour which was not crossed, Cohen giving a receipt written on a half-sheet of plain ordinary writing paper signed by himself. The third transaction took place on May 18, 1908. On that day Cohen again called on the respondents and induced them to purchase 740 Turkey sponges at 3*s.* 6*d.* each, amounting to 129*l.* 10*s.* Cohen, the appellants alleged, was selling the sponges below cost price, yet he allowed a discount of 9*l.* 10*s.* The respondents paid Cohen for these sponges 120*l.* in notes and gold. In this case Cohen gave a receipt written on one of the appellants' invoice forms. These three sums Cohen fraudulently appropriated to his own use. The appellants alleged that Cohen had no express authority to sell for cash or to receive payment in cash or any implied authority to do so, and that in fact none of the said sales were made by Cohen when acting in the ordinary course of business of a mercantile agent. They further alleged that if the transactions had been settled by cheque, drawn in favour of the appellants and crossed, the appellants would not have suffered any loss.

On June 16, 1909, the Lord Ordinary (Lord Salvesen) found against the respondents in terms of the alternative conclusion of the summons. On December 2, 1909, the Second Division recalled the Lord Ordinary's interlocutor and assoilzied the respondents from the conclusions of the action.

1911. March 9. *Buckmaster*, *K.C.* (with him *Kemp*, of the Scottish Bar), for the appellants. The case as presented to the Lord Ordinary (1) was that there was no sale and that Cohen was really a thief in possession of stolen goods. The appellants do not now dispute the validity of the sale; they ask only for 25*l.*, the price at which Cohen actually sold the goods. The intimations in the statement of account must be taken to have been a condition of the contracts of sale, and if they had been observed by the respondents Cohen's frauds would have been rendered impossible. Cohen was known to them as a traveller

(1) (1909) 2 Scots L. T. 24.

for sponges with no powers beyond those of a traveller, i.e., a power to deliver the goods and a power to give a receipt, but with no power to give receipts for cash, for cheques in his own name, or for open cheques. The whole object of the intimation that payments must be made by "cheques crossed" was to avoid frauds such as those which occurred. Neither Cohen's position nor the course of business gave him authority to receive cash.

Macmillan and the *Hon. William Watson* (both of the Scottish Bar), for the respondents. The ground taken by the appellants is different from the case presented in the Court below. In the Court of Session the point the respondents had to meet was that the sponges had been stolen and that no property in them had passed. If the respondents had known that the whole question would have been changed from a question of redelivery of stolen goods to a question whether the respondents had rightly paid Cohen for them, the direction of the respondents' evidence would have been different.

The appellants now claim the price of the goods paid by the respondents to Cohen. That claim is based on Cohen's agency and the printed intimations as to crossed cheques. But first the respondents were not affected by Cohen's knowledge; and secondly the intimation on the statement of account does not state and cannot be taken to mean that "no payment shall be made except by crossed cheques." Dealers who employ an agent must inform their customers of any limitation of the agent's authority. If the limitation affects the authority of the agent to receive payment in cash, notice must be given as to the manner in which the payments are to be made. It would have been easy to put on the statements of account "payment by crossed cheque only."

Buckmaster, K.C., in reply.

The House took time for consideration.

March 31. LORD LOREBURN L.C. My Lords, in this case I agree upon the whole with the Second Division, though I have found, as no doubt they found, some difficulty.

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It is a peculiar case. The sponge company employed an agent named Cohen, who proved to be a rogue. His authority was to carry round with him parcels of sponges, to sell them and fix the price, to deliver them, and to receive cheques in payment. He had dealt with Messrs. Watt for a considerable time, and generally—nearly always in fact—Messrs. Watt paid for the sponges they bought by crossed cheque payable to Cohen's principals. In 1904, however, if not earlier, Cohen commenced a system of fraud. He sold and delivered sponges to Messrs. Watt as before, but on four occasions he induced them to pay at once, either by open cheque payable to Cohen or by coin and notes, and then embezzled the money. The International Sponge Company now say that these four transactions were beyond Cohen's authority, and this action relates to the last three of the transactions.

Now the summons in this action claimed that, by reason of Cohen's fraud, the property in the sponges sold and delivered by him on these three occasions never passed to Messrs. Watt, and that they should therefore be redelivered to the pursuers. Your Lordships do not attach much importance to merely technical objections, but I am not at all persuaded that there is not substance in Mr. Macmillan's complaint that he has been put to a disadvantage by the pursuers' change of front. For the argument of Mr. Buckmaster in this House did not impugn the validity of the sale by Cohen, but did impugn the validity of the payment. He does not deny that the property passed, but says that the price must be paid over again. It was a different contention altogether, and the defenders may well have been prejudiced by being led so to direct their conduct of the litigation as to meet only a line of attack which has now been abandoned. However, I need not dwell upon this point, because in any view it seems to me that the appeal must fail.

It is clear that Cohen had no actual authority to receive in payment for sponges anything except crossed cheques in favour of the pursuers. It is not, however, established that Messrs. Watt had express notice that, while he might receive payment, such payment could only be in the way of crossed cheque in pursuers' favour. There is a printed direction in the form of

account usually rendered, relating both to payment by cheque and to the form of receipt. It is, however, partly equivocal; for it admits of a construction which allows of payment in cash, and in such case would dispense with the prescribed form of receipt. Still I am pressed by Mr. Buckmaster's argument that, whatever the notice may be, Messrs. Watt had no right to pay so large a sum as 120*l.* in notes or gold, as they did on one occasion, or to pay by open cheque payable to Cohen, as they did in the three incriminated transactions, because that was not in the ordinary course of business. And the excuses invented by Cohen to induce the defenders to pay in that way were flimsy enough. I should be very sorry to affirm as a general proposition that such payments to a traveller are to be upheld.

What determines me, though not without doubt, in upholding these payments in the present case is this. The good faith and integrity of Messrs. Watt are undisputed and indisputable. Cohen occupied a position of fuller authority than is usual. The only limit of his actual authority was as to the kind of cheque he might receive. And, finally, it is clear that on one occasion, a year or so before the three transactions now arraigned, Messrs. Watt had paid by open cheque payable to Cohen, and though the attention of the sponge company was drawn to the sale and a question arose about it between them and Messrs. Watt, yet it was allowed to stand and no objection was taken.

In the same way, the three incriminated transactions passed at the time without complaint or objection, and it was only after Cohen's dishonesty had been discovered that, on investigation of his frauds, the responsible managers of the pursuers' business found that their traveller had sold and delivered these sponges and received payment for them himself.

No doubt the reason of this protracted oversight was that the pursuers were the victims of a conspiracy among their own staff. Books had been falsified, auditors deceived, and documents concealed, so that the responsible managers were not aware of Cohen's dishonest dealings or of his departure from his instructions. But the same conspiracy which cheated them had also the result of misleading the defenders, Messrs. Watt, and causing

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them to act as though Cohen was entitled to receive payment in the manner in which they made it.

Accordingly this order ought, in my opinion, to be affirmed.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, for some years the respondents, who are a firm of saddlers in Edinburgh, have been in the habit of purchasing sponges from the appellants' firm. The appellants were represented by a commercial traveller of the name of Cohen. The goods were sold in bulk and not per sample, and accordingly Cohen was entrusted with the goods, which were seen by the customer and taken delivery of when bought. In the course of these years a certain number, not very large, of transactions of purchase were made, and in three of these the payments were made by cheques in Cohen's favour, namely, in October, 1905, October, 1906, and October, 1907. In the fourth sale (in May, 1908) payment was made by cash. In the proceedings in this action the payments of 1905, 1907, and 1908 are challenged. The payment of 1906, possibly by inadvertence, is not challenged. Substantially the transactions were—Goods bought and delivered and ready money paid. One satisfactory feature of the present case, as argued at your Lordships' Bar, was that no suggestion, direct or indirect, was made against the complete good faith of Messrs. Watt & Sons in settling for the goods on those terms. As Mr. Watt observes in his uncontradicted evidence, "I have had cash transactions with other travellers quite frequently who have sold me goods for cash on the spot."

In the autumn of 1908 it came to the knowledge of the appellants that irregularities were being committed by their employees, and a representative was despatched to make inquiries. In the course of his journey he visited the respondents, who gave every assistance in tracing the defalcations of Cohen. Mr. Watt explained that, in addition to the credit transactions which had taken place, there were some cash dealings; and he produced all the books and documents which bore upon these. In short, it is admitted that it was owing to the candour of Mr. Watt that

discovery of irregularity on the part of Cohen was made. This fact, of course, does not truly bear upon the legal responsibility, if any, resting upon the respondents' firm, but it confirms the position of the firm's entire good faith.

Having obtained this information from Messrs. Watt & Sons, the appellants proceeded to sue them for the value of the three parcels of goods referred to. Their plea now is that the payment already made by the Scotch firm shall stand out of the account because they were made to a person who was not authorized to receive cash. My Lords, in so putting the point I approach much more nearly to a really stateable case in law than the appellants' summons did. Having considered the latter, I am of opinion that the action as laid was an action for redelivery of the sponges sold, and, failing redelivery, and only in that event, for payment of their value. The shape of the whole action accords with the summons, and, in my humble judgment, the case as presented to the Lord Ordinary was that case and nothing else. The ground taken up was that there had been no sales, because Cohen was a thief in possession of stolen goods, and a vitium reale remained attached to these in the hands of Messrs. Watt & Sons. At your Lordships' Bar, however, what was argued was, that payment, that is to say, a second payment, by Messrs. Watt was due, on the ground mentioned, namely, that Cohen had exceeded, in the knowledge of Messrs. Watt, his authority by receiving cash. My Lords, in that position a serious question might have arisen as to whether the appellants were entitled, under the summons and case as laid, to obtain a decree as if upon a simple petitory conclusion, and the principle of the judgment in *White* v. *Victoria Lumber Co.* (1) might have been appealed to as to whether such a change in attitude at such a stage of the proceedings was permissible. My Lords, I do not think it necessary to make any pronouncement upon that point here, because, first, I think that the view presented so ably by Mr. Buckmaster was, to some extent at least, before the minds of the judges of the Inner House; and, secondly, after full consideration, I have come to be of opinion on the merits of this case that in the shape in which it is now presented it is without

(1) [1910] A. C. 606, 613.

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legal foundation. The case now made, however, is of importance to the mercantile community, and especially, as one can easily figure, in the practice of business as between wholesale and retail traders.

The respondents had other transactions than those above named with the appellants. And the latter found upon the course of dealing, and the language of the bill-heads and statements of account which passed between the parties, as being sufficient to charge Messrs. Watt with knowledge as to what was the only permissible form in which sales were permitted by the appellants to their travellers. On the top of these statements of account there were printed the words "Terms $2\frac{1}{2}$ per cent. discount for prompt cash." On some of the documents (and I observe on the document of October, 1906) the words were "Terms strictly net." There were also printed these words: "Cheques to be crossed 'National Provincial Bank of England —account payees.'"

My Lords, no one can doubt that these words did not in this case impress the customer with the view that cash payments were forbidden. And I am, after full consideration, unable to affirm that they constitute a plain declaration, by which customers with the International Sponge Importers, Limited, are bound, that no ready-money trade is done by that firm, and that travellers are prohibited from receiving money in exchange for goods delivered. It appears to me, my Lords, that such a prohibition should not be lightly inferred. The retail customer, visited by the well-known representative of a wholesale firm, does not, in my opinion, make an unreasonable or improper or careless supposition when he assumes that, if such an agent or traveller hold the double position of, first, being actually charged with the custody of goods and the delivery of these, and, secondly, being trusted by his employers to collect moneys due upon account, the same agent or representative is empowered to make even better terms for his employers by taking cash—rather than postponed terms of payment—for the goods handed over. I agree with the language of Lord Low upon this point: "Of course, the allowance of credit is entirely in favour of the buyer. It would be much better for the seller every time to get his

money down in exchange for the goods, and I can see nothing in the fact that the practice of the pursuers was to give credit, and, of course, of the purchasers to take credit, which could have led to the conclusion that it was beyond the power of their traveller to make a cash transaction."

In short, I do not doubt that not only did Messrs. Watt & Sons in good faith believe, but they were warranted in believing, that the trusted agent of the appellants had power to take the best terms for goods delivered, that is to say, cash, or its equivalent, namely, a cheque in his favour which could be cashed on the spot.

These views are sufficient to dispose of the case. But, my Lords, if we turn to the chapter of responsibility upon the part of the appellants' firm, the case presents singular features. When an agent is charged with the custody and disposal of goods in bulk, the ledgerizing of those goods, and the accounting for the balance thereof unpaid for in cash or unaccounted for by way of invoice, checks his intromissions and discloses in, say, monthly or quarterly periods the deficiencies in his stock. Such disclosure would put all parties on their guard, and go far to stop both delinquencies and blunders. I cannot find in this case any sufficient explanation why this firm was unable to discover by their ordinary course of business that stock was disappearing and defalcation going on.

The importance of that in regard to the respondents is this, that, had the very first transaction been investigated on that footing, it would have led to the discovery of a payment in cash not represented by invoice, and therefore the respondents would have been apprised by the appellants that cash payments were objected to and contrary to their methods of business. The customer, however, was left in the position of this payment four years ago being unchallenged, and he repeated on three subsequent occasions similar transactions in good faith. I should think it a very strong thing to hold that the wholesale dealer, thus (through possibly the defalcations of other employees) leaving the customer in the position of making payment after payment in cash without challenge, is entitled now to impugn the entire series as contrary to the custom of trade. It is unnecessary to

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deal with this point further, except to say that, even although my view had been different upon the main issue, I should have held it almost impossible to affirm, with regard to any of the transactions subsequent to the first which remained unchallenged, that the views of the appellants could be maintained. In my opinion the appeal fails.

Ordered that the interlocutor appealed from be affirmed and that the appeal be dismissed with costs.

Lords' Journals, March 31, 1911.

Agents for appellants: *Russell & Arnholz, for William Geddes, Solicitor, Edinburgh.*

Agents for respondents: *Busk, Mellor & Norris, for Mackenzie, Innes & Logan, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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THE CALEDONIAN RAILWAY COMPANY . APPELLANTS;

AND

THE GLENBOIG UNION FIRECLAY COMPANY . . . . . RESPONDENTS.

Mines—Railway—Mines of Coal, Ironstone, Slate, and other Minerals—Fireclay—Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 *Vict.* c. 33), *s.* 70—*Railways Clauses Consolidation Act*, 1845 (*England*) (8 & 9 *Vict.* c. 20), *s.* 77.

"Minerals," which under s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845, are excepted from the conveyance of lands purchased by railway companies:—

Held, affirming the decision of the First Division of the Court of Session, to include seams of fireclay, distinguished from ordinary clay by containing a large proportion of refractory substances, which make it valuable for the manufacture of bricks capable of resisting high temperatures.

APPEAL from a decision of the First Division of the Court of Session, Scotland. (1)

(1) 1910 S. C. 951.

The appellants and pursuers were the Caledonian Railway Company, and the respondents were the Glenboig Union Fireclay Company, who are manufacturers of fireclay wares. The appellants sought by their summons to interdict the respondents, first, "from entering or encroaching upon the property and subjects belonging to the appellants lying in the parish of Old Monkland and county of Lanark . . . . and in particular upon any portion of the beds or seams of fireclay or clay lying under or within the said property and subjects of the appellants; and, secondly, from working the beds or seams of fireclay in the lands of Castlespails, Gartverrie and Ramoan land adjoining the said property of the appellants, forming the subjects let to the respondents, in such manner as to injure the subjects of the appellants." The respondents claimed that the beds or seams of fireclay worked by them were excepted from the conveyance to the appellants under s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), and that they, as tenants of the successors of those who granted the said conveyances, were entitled to work the fireclay in question. On January 25, 1908, the respondents served a statutory notice on the appellants of their intention at the expiry of thirty days to proceed to work out the fireclay in the lands of Gartverrie and Ramoan, underneath or adjacent to the Castlecary and Garnkirk branches of the appellants' railway near Glenboig Station. In statement 5 the appellants averred that "the beds or seams of clay which the respondents have intimated their intention of working are not excluded from the titles by which the appellants acquired their property and are not within the subjects reserved therefrom under and in terms of the Railways Clauses Consolidation (Scotland) Act, 1845"; that "the said clay occurs in layers or strata of varying thickness lying between layers or strata of stone blaes and other substances at different depths from the surface and extends over a large area of the adjoining district"; that "it possesses the ordinary characteristics of clay suitable for the manufacture of such articles as pipes, tiles, bricks, fire-bricks and the like, and the clay in question in the present proceedings is so used by the respondents"; that "the said clay is not a mineral within the meaning of the said Railways Clauses Act."

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The Lord Ordinary (Lord Skerrington) stated the facts as to the position of the seam of fireclay and the result of the expert evidence as follows: "The seam of clay which the respondents have been working in the past, and which they propose to work under and adjacent to the appellants' railway, are two in number. The lowest, known as the 'Glenboig seam,' consists of a fireclay of a very high grade. The other seam, which consists of a clay known as 'compound,' lies immediately above the Glenboig seam. It also is a fireclay, but its fire-resisting quality and its value are considerably less than those of the Glenboig seam. As the fireclay wares manufactured by the respondents have obtained a high reputation in the market, the respondents prefer to use only the best of their fireclay, viz., the Glenboig clay, for the manufacture of such goods. They use the 'compound' for the manufacture of sanitary wares, which do not require to resist great heat, and also for making a mortar which is suitable for cementing together fireclay bricks. It was not argued that the use which the respondents make of the 'compound' is of any materiality in the present question, and I am of opinion that its character as a mineral must stand or fall along with that of the Glenboig clay. The thickness of each seam varies, but the average thickness of the 'compound' seam is about 4 feet and of the Glenboig seam about 9 feet. For shortness I shall refer to both seams as the 'Glenboig seam.'

"An elaborate proof has been led which establishes in great detail the position and situation of the Glenboig seam, the physical and chemical properties of the fireclays worked by the respondents, and the mode of working them; and also so far as known the general character of the strata lying between the Glenboig seam and the surface. There is no real controversy about these matters, but it may be convenient that I should shortly summarize the result of the proof in regard to these points. (1.) The Glenboig seam, so far as situated under the complainers' railway, lies at a depth varying from 60 to about 140 feet under the surface. It is interrupted by faults, which bring it at one point nearer to the surface than at another point, and which also alters its dip or inclination. Roughly speaking, the lie of the seam may be compared to a basin, one lip of which

crops out to the north-east of, and outside of the disputed area, and the other lip of which crops out westwards of, and outside of the disputed area at a place called Inchneuk. The outcrop at this latter point is about 600 yards to the west of Glenboig Station, and is probably nearer to some parts of the disputed area.

"(2.) The Glenboig seam is worked by means of underground mining according to the stoop-and-room system. The workings are approached by means of a mine which leads from the bottom of the Star shaft, which is situated outside and to the north of the disputed area. They are also approached by means of a mine which leads down from the outcrop at Inchneuk" (a neighbouring estate). "At the outcrop a small area about 1½ acres has been worked open-cast.

"(3.) The fireclays worked by the respondents are so hard that they have to be removed by blasting. After the lumps have been brought to the surface they are broken by a stone-breaking machine before they are put through the rolling mill commonly used by brickmakers and potters. Neither of the two seams worked by the respondents is homogeneous. The miners have instructions to send up to the surface only the good pieces, and the lumps are again assorted before being put into the stone-breaking machine.

"(4.) Fireclay is composed of a mixture of minute particles of various rocks, which in prehistoric times were carried by water and deposited at the bottom of seas or lagoons. The same is true of most of other clays, the most notable exception being the peculiar substance known as 'china clay.' The peculiarity which distinguishes fireclay from ordinary clay is the possession of a larger proportion of refractory or fire-resisting materials as compared with the fluxes or melting materials. The fire-resisting quality of a clay further depends, to some extent, upon the proportions inter se of the various fluxes, and also upon the size of its particles. The chemical change known as melting takes place more slowly where the particles are large than where they are relatively small. Accordingly it is impossible for a scientific man to say at what point a clay ceases to be a fireclay and becomes an ordinary clay.

"(5.) The strata lying between the Glenboig seam and the

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surface are of a highly variegated character. None of them has been worked, and it is impossible from the evidence to say whether any ever will be worked. The same is true of the strata below the Glenboig seam. The appellants have caused five bores to be made between the eastern and western boundaries of the disputed area, and the results of these bores are shewn pictorially in the section No. 101 of process. Roughly, the strata above the Glenboig seam may be divided into two groups. Immediately above the 'compound' there is a variegated series of strata marked 'B' upon the section, most of which are described by the borer as fireclays. Above this there is a variegated series of strata marked 'A' upon the section, and consisting mainly of what are described by the borer as sandstones and whinstones. This latter series reaches nearly to the surface, which is covered with a few feet of moss or clay or other material. The section shews that the same stratum is not of the same thickness at each bore and that a stratum found in one bore may be altogether absent in another. The explanation is that the deposits were 'lenticular'—in other words, were thick in the middle and tapering away to nothing like a lens.

"(6.) The fireclay worked by the respondents is, of course, incapable of sustaining vegetable life in consequence of its situation and its hardness. Though the appellants dispute the fact, I hold it to be proved that even after the fireclay has been removed to the surface and exposed to the air in a bing for many years, it does not become like ordinary surface clay. It disintegrates to some extent, but it does not become plastic, and nothing will grow upon it.

"With reference to the question whether fireclay is a mineral, the respondents allege in answer 5 that 'both in commercial and scientific parlance fireclay is and has always been described as a mineral.' This averment was remitted to probation, and evidence was led in regard to it without objection. The geological and mineralogical experts who were examined as witnesses agreed that fireclay was composed entirely of mineral substance; but they differed upon the question whether it could scientifically be described as a mineral. Some of them maintained the affirmative, others thought that the term 'mineral'

should be confined to homogeneous substances having a definite physical structure and a definite chemical composition. Fireclay does not fall within this definition, and accordingly it is not a mineral in the stricter sense. The question is one of classification, and although it bulks largely in the proof, the counsel on neither side maintained in argument that it had any bearing upon the construction of the statute. In the narrower sense of the term, as used by men of science, coal, ironstone, and slate, the three substances specified in s. 70, are not minerals. With reference to the commercial meaning of the word 'mineral' the appellants' counsel did not dispute that fireclay is generally regarded as a mineral by mining engineers and other business men, but he argued that this proved too much. He elicited from most of the witnesses who were examined on this matter the admission that they drew no distinction between fireclay and common clay. Some of them attempted to distinguish between the two, but not very successfully." And his Lordship (November 28, 1908) refused the prayer of the Note of Suspension and Interdict.

His Lordship added: "It is enough to say that the fireclay in dispute does not in my opinion form part of the subsoil. Should a question hereafter arise as to this same fireclay at the outcrop, or as to a bed of fireclay forming the ordinary subsoil of a district, different considerations may apply. I do not propose to express any opinion as to a case which may never occur; but if such a case should arise, there is some authority for the view that certain strata might pass to the compulsory purchaser if they lay on the surface, but might be reserved to the seller if they occurred at some depth below it: per Lord Watson, *Lord Provost of Glasgow* v. *Farie*." (1)

The Lord Ordinary's interlocutor was adhered to by the First Division of the Court of Session (the Lord President (Lord Dunedin) and Lords Kinnear, Johnston, and Salvesen) on July 15, 1910.

April 27, 28. *James A. Clyde, K.C.* (with him the *Hon. William Watson*) (both of the Scottish Bar), for the appellants. The seam of clay in question was not a mineral within the

(1) (1888) 13 App. Cas. 657, 679.

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meaning of s. 70 of the Act. The question whether clay is a "mineral" within the meaning of the section has been considered in five cases. In four of these the Courts have held that it was not a mineral.

In *Lord Provost of Glasgow* v. *Farie* (1) the fireclay was described as a valuable brick clay. In *Great Western Ry. Co.* v. *Blades* (2) the clay was of value to make the well-known blue Staffordshire bricks. In *Todd, Birleston & Co.* v. *North Eastern Ry. Co.* (3) the only description was that it was common brick earth. *Turners* v. *North British Ry. Co.* (4) differed from these. It was a pot clay used for rough pottery ware, and bricks could not be made of the clay without mixing ashes or sand with it. The last case was *Great Western Ry. Co.* v. *Carpalla United China Clay Co.* (5); there the china clay was an extract of the internal disintegrated parts of granite. There is no analogy between china clay and the clay the subject of this litigation. But there is a close analogy between clay which produces a heat-resisting brick and clays which produce a building brick or pottery ware.

In the title of the railway company dated 1856 the lands were conveyed "together with the whinstone and freestone therein." That looks as if the intention was to convey *all* that was there, and the lease to the respondents in 1877 bears this meaning, the words being that the lessees could "search for, work, win, raise, manufacture and carry away the fireclay and rotten rock or freestone, sand and freestone rock hereby let as fully and freely as the said first parties (lessors) could do themselves." The appellants contend that in 1856 the clay was not treated as a special substance, but that it was conveyed to the railway company as a part of the land; and the appellants can question the respondents' title up to the last moment before they pay them their claim for leaving the fireclay.

The evidence shews that the only distinction between the clay in question and other clay which makes bricks is that this clay

(1) (1888) 13 App. Cas. 657.
(2) [1901] 2 Ch. 624.
(3) [1903] 1 K. B. 603, 606.
(4) (1904) 6 F. 900, 903.
(5) [1909] 1 Ch. 218, 231; [1910] A. C. 83.

can bear more heat, the only difference being one of degree or quality, not of kind. In *Caledonian Ry. Co.* v. *Symington* (1), decided February 10, 1911, and now on its way to this House, it was contended that a sandstone of a rare and beautiful quality was a mineral, but the Court held that that was not enough to put sandstone into the reservation of minerals. A large part of the clay in question is useless for fireproof goods, and is actually used to make sanitary ware and similar articles.

The respondents contend that the vernacular of the mining world, the commercial world, and the world of landowners shews that this clay is a mineral, but this test cannot be adopted.

The evidence shews that mining engineers, commercial men, and professional men have never made a distinction between brick clay as non-mineral and fireclay as mineral. There is no standard for the discrimination of a clay that is a fireclay from one that is not. Whatever the Legislature meant in 1845 by the use of the word "minerals," it certainly did not contemplate any scientific definition. The evidence produced by the respondents goes so far as to allege that everything under the soil is a mineral. That was the old idea (see Lord Romilly in *Midland Ry. Co.* v. *Checkley* (2)), but it is now exploded.

Scott Dickson, D. F. (with him *Macmillan*) (both of the Scottish Bar), for the respondents. It is now established that the question whether a particular substance is or is not a mineral within the meaning of s. 70 of the Act is in each case a question of fact. Secondly, that the true test in a question whether exceptional substances are minerals or not is arrived at by considering the language of those dealing with it in the mining world, commercial world, and landowners. The Courts have laid aside the scientific view: *Great Western Ry. Co.* v. *Carpalla United China Clay* (3); *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (4) In the latter case Lord Loreburn L.C. said: "It is not possible to extract any uniform standard," and "that the matter was at large." In considering whether a particular substance is or is not a mineral it should be shewn to be an "exceptional"

(1) 48 S. L. R. 539.
(2) (1867) L. R. 4 Eq. 19.
(3) [1909] 1 Ch. 218, 231; [1910] A. C. 83.
(4) [1910] A. C. 116, 125.

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substance: Lord Loreburn L.C. and Lord Gorell in *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.*(1) The railway company in the statutory conveyance acquires land a centro usque ad cœlum with the exception of certain substances found in the land. The ordinary structure of the earth is composed of substances forming the common constituents of the land of the district in question. But in certain places there are found embedded in the land substances which are distinguished from these ordinary constituents of the earth's crust either from possessing a special character and utility or being otherwise exceptional. A substance must be exceptional in order to come within the category of minerals, and that was the reason why this House in *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (2) held that the sandstone there was not a mineral, because no evidence had been produced to shew that the sandstone was distinct from the common rock of the district. It was also established by *North British Ry. Co.* v. *Budhill Coal and Sandstone Co.* (2) that in deciding whether or not in a particular case exceptional substances are minerals the true test is to ascertain whether the particular substance in question was in the "vernacular of the mining world, the commercial world, and landowners" a mineral. The respondents submit that the substance here in question satisfies both the above requirements, for it is distinct from the ordinary soil of the district and is recognized in common parlance as a mineral. In the respondents' lease the subjects let are described as "beds or seams of fireclay" contained within certain boundaries. Both physically and chemically fireclay is distinguished from ordinary solum or clay. It is separated from the surface by intervening strata of sandstone and whinstone.

[He was stopped.]

James A. Clyde, K.C., in reply. It is a serious question if variation of quality is to decide whether a substance is or is not a mineral. The question of market value has no bearing on the interpretation of the term "minerals" in the section. [He also referred to *Earl of Jersey* v. *Neath Guardians*. (3)]

(1) [1910] A. C. 116, 127, 134. (2) [1910] A. C. 116, 125.
(3) (1889) 22 Q. B. D. 555.

LORD LOREBURN L.C. My Lords, this case is one of a class which always has been, and I suppose always will be, of exceptional difficulty, as will every case be in which the decision really depends upon a question of degree.

My Lords, the principle of the decision in this House in the *Budhill* (1) and *Carpalla* cases (2) seems to me to have been this: the Court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of "minerals" is attainable, the variety of meanings which the use of the word "minerals" admits of being itself the source of all the difficulty. It must be taken that what the railway company intended to get and the landowner intended to give was the land under the line, for the object was to give, not a wayleave, but a support. I say this speaking generally. Upon the other hand, if anything exceptional in use, character, or value was thereunder, that was reserved, provided it could be included under the word "minerals" as understood in the vernacular of the mining world, and the commercial world, and the landowner.

Now, my Lords, applying that in the present case, it is not doubted that the substance contained in the lowest seam, at least as to three-quarters of it, was a "mineral" within the vernacular which I have described. It is said that the same persons who used that language also included not merely the remaining fourth of the lowest seam, but the clay contained in all the other seams. I will assume that it is so. But in fact it is no answer to say that the vernacular has a still wider application than it would have if it were restricted solely to Glenboig fireclay.

My Lords, the evidence given as to common meaning is evidence given of the common meaning at the present day; I should assume that it was the same at the time of the sale, unless sufficient ground was given for coming to a contrary conclusion. The particular seam now being worked, to which alone the present decision of your Lordships will apply, is certainly of an exceptional character as to its properties and value upon the evidence before us; and it is not established in the evidence before us that other material is present in such large proportions as to destroy this exceptional character.

(1) [1910] A. C. 116, 125. (2) [1909] 1 Ch. 218; [1910] A. C. 83.

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It is impossible in my view to give further assistance in ascertaining when a substance is to be treated as a mineral within the Act of Parliament than we have endeavoured to give in the cases already cited.

LORD MACNAGHTEN. My Lords, I agree.

LORD SHAW OF DUNFERMLINE. My Lords, I am of the same opinion.

LORD ROBSON. My Lords, I am also of the same opinion.

Ordered that the interlocutors appealed from be affirmed, and that the appeal be dismissed with costs.

Lords' Journals, April 28, 1911.

Agents for appellants: *Grahames, Currey & Spens, for Hope, Todd & Kirk, W.S., Edinburgh, and Hugh R. Buchanan, Solicitor, Glasgow.*

Agents for respondents: *Walker, Martineau & Co., for Craig & Henderson, Writers, Glasgow, and Morton, Smart, Macdonald & Prosser, W.S., Edinburgh.*

[PRIVY COUNCIL.]

SALLY WERTHEIM . . . . . PLAINTIFF;

AND

CHICOUTIMI PULP COMPANY . . . . . DEFENDANTS.

J. C.*
1910
Feb. 16, 17, 18;
March 18.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Breach of Contract—Late Delivery of Goods sold—Measure of Damages—Purchaser entitled only to Indemnity against Loss.

The general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position as he would have been in if the contract had been performed. In the case of late delivery the measure thereof in order to indemnify the purchaser is the difference between the market price at the respective dates of due and actual delivery of the goods purchased; but if the purchaser has resold them at a price in excess of that prevailing at the date of delivery he must in estimating his damages give credit therefor.

In an action for damages for breach of contract dated March 13, 1900, to deliver 3000 tons of moist wood pulp between September 1 and November 1 of that year the appellant claimed to recover 27*s.* 6*d.* a ton, the difference between 70*s.*, the market price at the port of delivery on the due date, and 42*s.* 6*d.*, the market price at the same place on the date of actual delivery; but it appeared that he had sold the goods at 65*s.* a ton, involving a loss to him of only 5*s.* a ton:—

Held, that he was entitled to recover only 5*s.* a ton. As the Court below had on the evidence decreed that amount on 2000 tons only, their Lordships increased the amount by 250*l.* in respect of the remaining 1000 tons together with a further amount as subsequently agreed between the parties.

APPEAL from a judgment of the Court of King's Bench for the Province of Quebec (October 3, 1908) reversing in part a judgment of the Superior Court (November 12, 1907) which had dismissed the appellant's action and entering judgment for the appellant for $2434 in respect of a portion of the appellant's claim.

The questions raised in the appeal arose out of a contract dated March 13, 1900, set out in their Lordships' judgment, for the supply by the respondents of pulp wood to the appellant, the main question decided being as to the measure of damages payable by the respondents for late delivery thereof.

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and LORD SHAW OF DUNFERMLINE.

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So far as now material the plaintiff sued under the circumstances detailed in the said judgment to recover $20,047.50 as damages for the respondents' failure to deliver 3000 tons of pulp under the contract of March 13, 1900, not later than November 1, 1900, representing the difference between the price of pulp in November, 1900 (70*s.*), and that in July, 1901 (42*s.* 6*d.*).

The respondents pleaded in regard thereto that they had manufactured the pulp with all possible celerity, but that the appellant had refused to take delivery in the autumn of 1900; that the appellant asked for it only in June, 1901, when it was shipped; and that he accepted it without reserve, in execution of the contract, and made no claim for damages.

The trial judge (McCorkill J.) found that the respondents had enough pulp in stock during the months of September, October, and November, 1900, to have fulfilled their obligation of supplying 3000 tons wet; and that the market price of pulp wood in November, 1900, when the pulp should have been delivered, was 70*s.* per moist ton, and that when the pulp was in fact delivered it had fallen to 42*s.* 6*d.* per moist ton. He dismissed the action, being of opinion that it was brought for late delivery, and not for failure to deliver, that when delivery was made in June no such claim in damages was contemplated, and that no notice had been given of the intention to claim damages.

The Court of King's Bench affirmed the judgment of the trial judge in respect of claims not material to this appeal, but reversed it on the question of damages for late delivery, and by a majority assessed them at $2434, being part of the $20,047 claimed.

The majority held that pulp had risen in England in the month of November, 1900, to 70*s.* per ton; that the appellant had contracted on March 2, 1900, for future deliveries to the Darwen Mills, and others, at 65*s.* per ton, and they allowed the 5*s.* difference in respect of 2000 tons only as being the measure of damages.

Sir R. Finlay, K.C., and *G. G. Stuart, K.C.*, for the appellant, contended in the first place that on the evidence the Court of King's Bench was wrong in only allowing damages in respect of the failure to deliver at due date 2000 tons of moist pulp. It

was established that the breach extended to the whole 3000 tons contracted for. With regard to the measure of damages for late delivery the rule as formulated in Benjamin on Sales, 5th ed., p. 987, is too well established to be disregarded. It is "the difference between the value of the goods at the date fixed for delivery and their value when delivered." When there is a market their value is prima facie the market price; when there is no market their value may be otherwise determined—e.g., by the price of the best substitute procurable. There is the further rule that where the goods at the time of contract have been sub-sold or are bought for sub-sale, then if there is a market and a sub-sale the buyer's duty to his seller is to buy goods in the market to supply the sub-purchaser, the difference in price being in the absence of special circumstances the measure of damages. Here, although there was no market in Chicoutimi, yet, on the long course of dealing between the parties and consequent communication between Chicoutimi and Manchester, the market price at Manchester less the admitted cost of carriage should be taken to be the market price at Chicoutimi. Applying this rule, the measure of damages should be the difference between the value of the pulp on November 1, 1900, when the respondents made default, and its value at the time of delivery in June, 1901, namely, 27*s.* 6*d.* per ton. The appellant did not by taking delivery in June, 1901, waive his right to damages for failure to deliver in November, 1900.

J. B. Atkin, K.C., L. A. Taschereau, K.C., and *Theobald Mathew*, for the respondents, contended that the claim of $20,047, being the total of 27*s.* 6*d.* per ton, as damages for late delivery was excessive and unreasonable. The evidence shewed that the actual loss incurred by the purchaser was 5*s.* a ton and that payment to him on that footing would afford him a complete indemnity, which was all that he was entitled to. The obligation of the buyer under this contract was to provide a vessel on which the respondents should place their goods. To the extent to which he did not do so he had no claim. He failed entirely to comply with that requirement, and it was contended that his claim for damages could not be sustained. The appellant should have provided a ship in October, and if he had done so, and the

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respondents had failed to deliver, the measure of damages would have been the difference between the contract and market price on October 31, which according to the authorities was the day on which the damages should be fixed. The place of delivery in this case was Chicoutimi, but there was no market there, and consequently the rule could not be applied. It was contended that the decree of the first Court dismissing the action was right, and that in any event the sum of $2434 decreed by the Appellate Court was the utmost which the appellant could reasonably claim. Reference was made to *Borries* v. *Hutchinson* (1) and *Ogle* v. *Earl Vane.* (2)

Sir R. Finlay, K.C., in reply, referred to *Grand Tower Co.* v. *Phillips* (3) as to the measure of damages where there is no market, and to the following authorities in support of the general rule as to damages contended for by the appellant:—*Cahen* v. *Platt* (4); *Wemple* v. *Stewart* (5); *Rodocanachi* v. *Milburn* (6); *Elbinger Actien-Gesellschafft* v. *Armstrong* (7); Benjamin on Sales, 5th ed., p. 991, referring to *Dunlop* v. *Higgins* (8); Mayne on Damages, 7th ed., p. 64; *Ströms Bruks Aktie Bolag* v. *Hutchison* (9); *Duff & Co.* v. *Iron and Steel Fencing and Buildings Co.* (10); *Warin* v. *Forrester* (11); Sale of Goods Act, 1893, s. 51; and to the notes on p. 971 of Benjamin on Sales, 5th ed.

1910 *March* 18.

The judgment of their Lordships was delivered on March 18, 1910, but its issue was delayed at the request of parties in order to arrive at a consent enhancement of the amount awarded for damages. The amount of 2102*l.* 14*s.* 8*d.* was eventually substituted for 250*l.*, and in February, 1911, the judgment so amended was issued which had been delivered by

LORD ATKINSON. This is an appeal from the judgment of the Court of King's Bench for the Province of Quebec (Appeal

(1) (1865) 18 C. B. (N.S.) 445.
(2) (1867) L. R. 2 Q. B. 275; and in appeal, (1868) L. R. 3 Q. B. 272.
(3) (1874) 90 U. S. 471.
(4) (1877) 69 N. Y. 348.
(5) (1856) 22 Barbour (N.Y.), 154, 159.
(6) (1886) 18 Q. B. D. 67, 77.
(7) (1874) L. R. 9 Q. B. 473, 476.
(8) (1848) 1 H. L. C. 381, and note on p. 992.
(9) [1905] A. C. 515.
(10) (1891) 19 R. 199.
(11) (1877) 4 R. 190; affirmed in 4 R. (H.L.) 75.

Side), dated October 3, 1908, affirming in part and reversing in part a judgment of the Superior Court of that Province, dated November 12, 1907.

By the former judgment the respondent company was condemned in a sum of $2434 and costs.

The defendant company carry on the manufacture of wood pulp at the town of Chicoutimi, which is situate on the river Saguenay, a tributary of the St. Lawrence in the Province of Quebec. The plaintiff is the sole partner in a German firm of merchants carrying on business at Hamburg in Germany. He has an agent at Manchester named Reichenbach, where he trades in the pulp he imports from Canada and elsewhere, and an agent at New York named Goldman.

He claims in this action to recover damages from the respondents under three separate heads for three separate breaches of a contract entered into between them on March 13, 1900, to deliver at Chicoutimi f.o.b. 3000 tons of moist wood pulp between September 1 and November 1 in that year, at a price which was equivalent to 25*s.* per ton. The contract was in the terms following:—

"Quebec, 13 Mars, 1900.

"La Compagnie de Pulpe de Chicoutimi consent à livrer à A. Wertheim & Cie., de Hambourg, trois mille (3000t) tonnes de sa pâte de bois habituelle, humides, de 2240 lbs., à $11.00 la tonne de 2000 lbs. sèche, livrée à Chicoutimi sur vapeur ou vaisseau ou char, du premier Septembre au premier Novembre courant si possible si faire se peut en partie plutôt.

"Ceci en règlement complet total et absolu de toute réclamation quelconque qu'ils ont ou pourraient avoir sur les transactions faites jusqu'à ce jour en vertu du contrat du 9 Décembre, 1898.

"Termes de paiement comme ci-devant.

"La Cie. de Pulpe de Chicoutimi,

"J. E. A. Dubuc, Dir.-Gt."

The first breach relied upon consists in the respondents having delayed the delivery of this quantity of pulp till the month of June, 1901; the second in the alleged inferior quality of the pulp actually delivered; and the third in its alleged

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deficiency in weight. In the view which their Lordships take of the appellant's claim under the second and third heads, it is unnecessary to deal with the amount demanded in respect of each. The first was the main claim. In respect of it the appellant claimed to recover 27*s.* 6*d.* per ton on the 3000 tons mentioned in the contract, that being the difference between the market price of such pulp at Manchester, the ultimate destination of the pulp, at the time it should have been delivered, namely, 70*s.* per ton, and its market price there at the time it was in fact delivered, namely, 42*s.* 6*d.* per ton; the differences between the market values of the pulp at these respective times being, according to Sir Robert Finlay's contention on behalf of the appellant, the well-established and indisputable measure of damages for delay in breach of contract in delivery of goods. The appellant in reality never sustained this loss nor anything like it, because he sold the goods under contracts, some anterior in date to the contract sued upon, the others anterior in date to the actual delivery, at the price of 65*s.* per ton, which is only 5*s.* per ton less than the top market price for which the pulp could presumably have been sold in Manchester had it arrived there in November, 1900, the contract time. Yet so rigid, it is insisted, is this formula or rule, that the resales must be ignored as collateral and irrelevant matters and damages be awarded for a loss which in reality has never been sustained. That, however, is not the only peculiarity of the appellant's claim. He admits that 13*s.* per ton would cover all the costs and expenses of the transport of the pulp from Chicoutimi to Manchester. It would thus cost him when delivered there 38*s.* per ton in all. If the pulp had been delivered in November and the appellant had sold it then at the highest market price, namely, 70*s.* per ton, he would have made a profit on it of 32*s.* per ton; but if the appellant was to succeed in this action, he would have received from the sub-vendees the price at which the goods were actually sold, namely, 65*s.* per ton, plus 27*s.* 6*d.* per ton, from the respondents in the shape of damages, making together 92*s.* 6*d.* per ton, leaving a profit of 54*s.* 6*d.* per ton, or 22*s.* 6*d.* per ton more than if the contract had never been broken at all.

One cannot but feel that the reasoning which leads to results so unjust and anomalous must be fallacious.

On the assumption that by this delay in delivering of the pulp the respondents were guilty of a breach of their contract—a point to be dealt with presently—and that the appellant was therefore entitled to recover some damages in respect of it, the main question for decision is on what principle and by what rule those damages are to be measured under the circumstances of this case. That question has given rise, apparently, to much conflict of judicial opinion. By the judgment and decree appealed from, the damages seem to have been fixed at 5*s.* per ton, that being the difference between the full market value of the pulp at Manchester when it should have reached that town and the rate at which it was sold when it in fact reached it. The rate per ton so fixed is, in their Lordships' opinion, the highest rate at which it could properly be fixed, since it covers the loss actually sustained. And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed: *Irvine* v. *Midland Ry. Co.* (*Ireland*) (1), approved of by Palles C.B. in *Hamilton* v. *Magill.* (2) That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages the difference in market prices at the respective times above mentioned is merely designed to apply this principle and, as stated in one of the American cases cited, it generally secures a complete indemnity to the purchaser. But it is intended to secure only an indemnity. The market value is taken because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain them in that market at that price. In such a case, the price at which the purchaser might in anticipation of delivery have resold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter:

(1) (1880) 6 L. R. Ir. at p. 63. (2) (1883) 12 L. R. Ir. at p. 202.

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Rodocanachi v. *Milburn*. (1) The purchaser not having got his goods should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market, but if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, that presumption is rebutted and the real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position.

The authorities cited, *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (2) and *Schulze & Co.* v. *Great Eastern Ry. Co.* (3), bear out this conclusion. In both these cases the goods, by reason of the delay in delivery, had become valueless or of less value to the purchaser. And it is clear from the judgments that the measure of damages in such a case is the difference between the contract price and the value of the goods to the purchaser when obtained. The same remark applies to the other cases cited.

In order to deal with the several points raised in argument, and to determine whether the respondents committed any breach of contract in fact, or what is properly the number of tons on which the rate of 5*s*. per ton should be calculated, and whether the appellant's claims under the second and third heads are valid or not, it is necessary to examine the correspondence and oral evidence at some length.

(1) 18 Q. B. D. 67. (2) (1861) 9 C. B. (N.S.) 632.
(3) (1887) 19 Q. B. D. 30.

The appellant and respondents had been dealing in this pulp for several years. During that time several consignments of it had, according to the evidence of Reichenbach, the local agent, been delivered to the appellant at Manchester. The appellant was not a manufacturer. He had no works at Manchester. The respondents must have known the goods were required for resale. On December 9, 1898, they had entered into a contract for the sale and delivery to the appellant of the entire output of the respondents' pulp mill at Chicoutimi for the year 1899, on the terms following as to payment:—

"Terms.—Buyers to open a credit in a bank against which sellers are to draw for full amount against bills of lading. In consideration of buyers paying full cash against documents, sellers agree to authorize their London bankers to give buyers a written guarantee of $5000 (five thousand dollars) in the event of any valid claims or deficiency in their invoices."

These are the terms to which the phrase "Termes de paiement comme ci-devant" contained in the contract sued on refers, and mean practically payment in advance. This contract of December, 1898, was carried out in the main; but differences arose between the parties in respect to it. These by the terms of the contract sued upon were settled. What was the nature of those differences, or of the claims alleged to arise out of them, does not appear, nor does it appear what effect, if any, they had on the contract price of the pulp to be supplied.

Much controversy was raised at the trial as to the nature of the contingencies against which the respondents sought to protect themselves by the introduction into the contract of the words "si possible." The appellant contended that the contract meant that the respondents should be absolutely bound to supply the specified quantity of pulp within the stipulated period, unless prevented by some fortuitous circumstances or by force majeure.

The respondents, on the other hand, contended that by the introduction of these words it was merely intended to provide that they, the respondents, should only be bound to deliver the 3000 tons of pulp within the months of September and October if their obligations under earlier contracts which, to the knowledge of the appellant's agent, they had theretofore entered into

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permitted them to do so. In the result, for reasons to be hereafter mentioned, it became unnecessary for the Courts to decide which of the two constructions was the true one, but it is clear from the correspondence that the respondents up to the last insisted that the latter of the two was the correct construction. They protested that after implementing those earlier contracts no sufficient surplus of their output remained over to enable them to deliver to the appellant the 3000 tons contracted for, or any portion of them, during these months, and asserted that because of this circumstance they had not, by their failure to deliver the pulp within the specified time, been guilty of any breach of their contract. They never repudiated the contract. Till the goods were actually delivered in the month of June, 1901, they never treated it as at an end. On the contrary, on the 11th of that month they delivered to the appellant an account claiming payment of interest on the purchase-money at the rate of 6 per cent. from December 20, 1900, to June 6, 1901, and also claiming payment of a sum of $500 for five months' storage of 3050 tons of pulp, and of a sum of $108 "insurance on stock pulp held over winter." The claim for each and every one of these items must have been based upon the assumption that the contract of March 13, 1900, was up to the month of June in the following year a valid, binding, and subsisting contract.

The river Saguenay, like the St. Lawrence, is frozen over in winter, and Chicoutimi becomes for some months an ice-bound port. In the year 1900 all navigation ceased on November 25.

As early as July 9, 1900, Goldman, the appellant's agent, wrote to the respondents a letter containing the following passage:—

"We should also like to know whether you can deliver us end of this month part of the 3000 tons which were to be delivered end of this year, which you stated you thought you could deliver in part before close of navigation on the St. Lawrence. If you can deliver us a quantity we probably could get one of Furness Line steamers to stop at Chicoutimi end of this month in order to load this pulp.

"Kindly advise us in regard to this by wire on receipt of letter and oblige."

In reply to which he received on July 12 a telegram in these words: "Impossible to ship pulp presently."

He wrote again on the 12th of the same month, acknowledging this telegram and stating that he awaited their letter, in which he hoped they would advise him when they would make shipment; and again upon the 14th, two days later, he wrote to them a letter containing the following passage:—

"In regard to the 3000 tons we note that at present time you cannot state when you could deliver some of the 3000 tons that are due us. It would greatly accommodate us if you could deliver this quantity or part of it from now on until close of navigation at the St. Lawrence and we have received cable from Hamburg asking whether you could not oblige them and do this."

It does not appear whether any reply to this communication was received.

Goldman, on August 7, wrote again to the respondents, reminding them that, according to their contract, the delivery of the pulp was to commence on September 1 and if possible earlier, stating that it would be a great favour and help to his principals if they would commence delivery at once, begging of them as a favour to himself to advise him promptly whether they would commence the delivery at once, and further stating that he was aware, from shipment he had noted they were making, that they had pulp to spare beyond what was required for their contract with Becker & Co., and that in all justice to the Hamburg house they ought to make delivery on their contract before shipping pulp to other parties. He further reminded them that it was then getting to the close of the navigation on the St. Lawrence, that freights were very firm and were advancing, and that space must be engaged at once in order to secure room on steamers sailing from the St. Lawrence up to the close of the navigation.

Though a prompt reply to this letter was asked for, none was apparently received, or, if received, was not given in evidence.

After two months' delay the appellant wrote from Hamburg a letter in the following terms:—

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COMPANY.

"Hamburg, 7th October, 1900.

"La Compagnie de Pulpe de Chicoutimi.

"Dear Sirs,

"According to arrangement made with you under date of 13th March, you have undertaken to ship 3000 ts. woodpulp for us from 1st Sept. till 1st November a.c., and only on this condition, viz., that you execute such undertaking we have declared ourselves willing to waive our different claims against you.

"The remark in the cited arrangement 'if possible' has been fixed verbally in presence of two members of your board and afterwards confirmed by correspondence from your managers as only referable to cases of force majeure. No such force majeure having been notified to us, the shipment is overdue partly already since several weeks.

"To our greatest surprise our representative Mr. Goldman informs us that you will not ship before November, but that besides you had sold some parcels during the summer to others.

"We herewith beg to give you notice that we require from you to put at our disposal 1500 to 2000 tons of your pulp latest last week of October and the balance of 1000/1500 tons latest 15th November next. Failing to do so we are compelled to hold you responsible for the consequences arising from such non-fulfilment. At the same time we beg to give you notice that in the event of non-fulfilment of our demand, we consider the arrangement made with you broken by you and consequently ourselves free to act with regard to our old claims as if such arrangement had not been arrived at. Besides we reserve ourselves the right in case of your delivering the parcels as requested above to charge you for such part delivered after the time stipulated in the arrangement the extra freight caused by such delay.

"We remain, dear Sir,

"Yours truly,

"A. Wertheim & Co.

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This letter seems to have been sent through Goldman. It must have taken some time to reach his office in New York.

He apparently forwarded it to the respondents under cover of a letter from himself dated October 22. On October 26 the following letter in reply was received by Goldman :—

"S. Goldman, Esq., Agent,
"99, Nassau St., New York.

"Gent.,

"Your favour of 22nd inst. received, so was letter enclosed from Hamburg. Advise Hamburg that we did not sell a single ton after our agreement of 13th March, 1900, and as agreed as soon as possible we will deliver them 3000 wet tons. You remember it has been understood our previous sales had to be delivered before, and at that time we hoped we would be ready between 1st Sept. and 1st Nov. It has been impossible; we have not yet finished Mr. Becker's contract, and same must be over before we deliver you these 3000 tons.

"Yours truly,
"J. E. A. Dubuc, Manager.

"In reply to a few of your letters I kept you posted and you were always aware we could not deliver in Sept. and Oct."

Thus, whether the appellant craved as a favour, or demanded as a right, the delivery of the 3000 tons of pulp within the contract time or before the river St. Lawrence was closed by ice, the reply was in effect the same: "We cannot deliver; we are not bound to deliver to you; all our output is absorbed in implementing contracts anterior to yours."

The sequel shews that the excuse thus put forward was false, and the accusations as to sale to others contained in Goldman's letter of August 7 only too well founded; but the excuse was made, and, in the face of it, it would have been absurd for the appellant to have tendered a ship to take a cargo which it was known beforehand could not, or would not, be provided, or to have made a formal demand that the goods should be delivered within a particular period, as that demand had in effect been already many times made to no purpose. The river closed on November 25. The offers contained in the appellant's letters of October 7 and November 27, though made in relief of the respondents, were declined, and, having been declined, the parties were left in precisely the same position as if the offers

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had never been made. They affect neither the rights nor the liabilities of the parties.

The appellant, however, wrote to the respondents the following letter :—

"Hamburg, 15 January, 1901.

"Chicoutimi Pulp Company,
Chicoutimi.

"Dear Sirs,

"After you have failed to deliver the 2000 tons wood pulp in the time stipulated in our arrangement of 13th March, 1900, whereby shipment of these 3000 tons will only have place after opening of navigation, so that thereby the essential purpose of said arrangement has become illusionary, we herewith give you notice that we have instructed our lawyers, Messrs. Caron, Pentland & Stuart, Quebec, to bring suit against you for the amount of our damages.

"Yours truly,
"A. Wertheim & Co.
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So things ended for the time.

The respondents continued during the winter to manufacture and store their pulp.

On May 22, 1901, the respondents were recalled to the performance of their obligations by the receipt of the following telegram from the appellant :—

"Hamburg cables have chartered steamer *Importer* to load 3000 tons at Chicoutimi for Manchester. Steamer expected ready to load about May 28th. Must load 600 tons daily, weather permitting. Have cabled credit Bank Nationale, Quebec. Make arrangements deliver pulp promptly as required."

To which they replied :

"Will do all possible to give her quick despatch. Might do in five days. How early will she be Chicoutimi?"

The steamer *Manchester Importer* soon after arrived. She was loaded and despatched in June. The 3000 tons of pulp were carried to Manchester, there received and despatched to the several sub-vendees ; but there was no accord and satisfaction as has been suggested, since the respondents insisted they had been

guilty of no breach of their contract, and if the statements contained in the letter of their manager dated October 20 had been true, they would have been right. There was no new contract, as has been also suggested. The performance of the old contract, which had been as it were in abeyance, was revived and carried out, and that was all.

The statements contained in Dubuc's letter of October 26, 1900, were entirely inaccurate. He had a surplus amply sufficient to enable him to carry out the contract with the appellant. In his evidence in chief and on cross-examination he admits it. The figures he gives on cross-examination are unintelligible unless on the assumption that he was dealing with tons of dry pulp.

He admitted that the respondents manufactured from January 1 to November 1, 1900, 9975 tons of dry pulp, and that of this his company delivered to Becker & Co. 6537 tons, and to two other customers 881 tons, making together 7418, leaving a surplus of 2557 tons of dry pulp, equivalent to over 5000 of wet or moist pulp. Out of this, had they been so inclined, they could have delivered to the appellant 1500 tons of dry pulp, equivalent to 3000 tons of wet or moist pulp.

The trial judge, McCorkill J., adopted these figures and found as a fact that the respondents had on hand sufficient after satisfying their earlier contracts to deliver to the appellant all the latter was entitled to demand. It appears to their Lordships to be quite an error to suppose, as apparently has been supposed, that this learned judge merely found that the respondents could have delivered 1500 or 2000 tons before November 1. His finding to the contrary is quite plain and unambiguous. Their Lordships are therefore of opinion that the damages should have been calculated on 3000 tons of pulp, not upon 2000, as appears to have been done, and that the sum awarded is therefore too little by 250*l.*

It was pointed out by Mr. Atkin, on behalf of the respondents, that the delivery contracted for was a delivery at Chicoutimi, not at Manchester; that there is no market at Chicoutimi, and that therefore the rule insisted upon on behalf of the appellant could not be applied; but, having regard to the long course of

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dealing between the parties and the intercommunication between Chicoutimi and Manchester consequent upon it, their Lordships think, on the authority of the three cases cited from the Reports of the State of New York, namely, *Grand Tower Co.* v. *Phillips* (1), *Cahen* v. *Platt* (2), and *Wemple* v. *Stewart* (3), as well as from *Bolag* v. *Hutchison* (4), the market price at Chicoutimi may for the purposes of this measure of damages be fairly taken to be the market price at Manchester, despite the distance which separates them, of course, less the cost of carriage, which in this case is admitted to be 13*s.* per ton. If this be taken to be so, the same sum of 13*s.* per ton must of course be deducted from the price (65*s.* per ton) obtained on resale, so that the difference between the two equally diminished sums is necessarily the same, namely, 5*s.* per ton. This is, in their Lordships' opinion, the amount of the damages which the appellant is entitled to recover under this head.

As to claims 2 and 3, the trial judge and each of the Courts before which the case has come have considered the evidence given in support of them loose and unsatisfactory. Their Lordships are inclined to concur in that view, and are not by any means so convinced that the decision arrived at was erroneous as to induce them to overrule it on a pure question of fact.

No cross-appeal has been lodged in this case, though it is stated that the respondents have appealed against the judgment and that this appeal is now pending in the Canadian Court. Their Lordships do not think, however, they are precluded from amending the judgment appealed against by increasing the amount awarded by 250*l.*, i.e., 5*s.* per ton on 1000 tons, together with the sum of 1044*l.* 19*s.* 8*d.* for freight from Manchester to the different places of delivery, and interest from February 28, 1902, to February 28, 1911, agreed at 807*l.* 15*s.*

As, therefore, both parties have failed in part and succeeded in part, each should bear their own costs.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, but that the judgment appealed against should be amended by being increased by the sum of

(1) 90 U. S. 471.
(2) 69 N. Y. 348.
(3) 22 Barbour, 154.
(4) [1905] A. C. 515.

2102*l.* 14*s.* 8*d.*, or its equivalent in dollars, and that each party should bear his own costs of the appeal.

Solicitors for appellant: *Stephenson, Harwood & Co.*
Solicitors for respondents: *C. Russell & Co.*

[PRIVY COUNCIL.]

JOHN MATTHEW VINCENT SMITH AND OTHERS . . . . . } APPELLANTS;

AND

CHARLES MATTHEW GERMAIN COCK AND OTHERS . . . . . } RESPONDENTS.

J. C.* 1910 *Nov.* 30; *Dec.* 2. 1911 *Feb.* 2.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Suit for Contribution—Trustees under Two different Wills—Discretionary Power to provide Maintenance for the same Legatee — Separate and independent Obligation—No Right of Contribution.

Discretionary power was given to the appellants as trustees under a will to pay to the testator's daughter 800*l.* a year, the unpaid portion thereof to fall into the residue of his estate. A like power was given to one of the appellants and a respondent as trustees under the will of her sister to pay such sums as they might think fit in and towards her maintenance, the residue of the income of the testatrix's estate to be paid to her nephew, the corpus to go in equal shares to his children on his death. The trustees under the first will paid 400*l.* a year to the daughter, but on the death of the testatrix they reduced the allowance to 100*l.* a year, while the trustees of the second will paid from 700*l.* to 800*l.* a year.

In a suit by the said nephew and the trustee of his insolvent estate for an order that the said daughter's maintenance should be provided for by a proportionate contribution from the two estates:—

Held, that there was no common obligation and no right to contribution. The trusts were different in their terms to be exercised at the discretion of different trustees, and the resulting obligations were separate and independent.

APPEAL by special leave from a judgment of the High Court (October 11, 1909) reversing a judgment of the Supreme Court of Victoria (February 8, 1909) at the trial of the action.

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

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John Matthew Smith, the testator hereafter mentioned, died on April 21, 1898. His daughter Lucy Smith, the testatrix, died on November 12, 1903. Both wills made provision for Alice Smith, a sister of the testatrix and daughter of the testator. Prior to the death of Lucy the appellants as trustees of the first will allowed for upwards of five years 400*l.* a year, being a part of the 800*l.* a year which they were authorized to pay out of the testator's residuary estate for the maintenance of Alice. After Lucy's death they reduced the allowance to 100*l.*, to the relief of the testator's estate in which the plaintiff had no interest and to the consequently greater burden of Lucy's estate in which he was greatly interested.

The material provisions of the wills are stated in their Lordships' judgment. The plaintiff Cock sued the appellants and others on October 17, 1907, and on August 6, 1909, the trustee of his insolvent estate was added as a co-plaintiff. He claimed so far as material to this appeal (1.) a declaration that the appellants as trustees of the will of the said John Matthew Smith had improperly, unfairly, and unreasonably, and in breach of their duties as executors and trustees of their testator's will, made the above-mentioned reduction; (2.) an order that the amount necessary for Alice's maintenance, or alternatively that at least 400*l.* a year for such purpose, should be borne by the testator's estate alone, or alternatively by the estates of the testator and of the said Lucy Smith proportionately according to their respective amounts or values.

The trial judge gave judgment for the defendants.

The High Court in appeal discharged this judgment and remitted the action to the Supreme Court for further trial of certain issues of fact and with declarations which so far as material to this appeal were to the effect that the appellants as trustees of the first will were and are respectively bound in every year to exercise an independent individual discretion as well as their joint discretion as to how much of the sum of 800*l.* a year during the life of Alice Smith should be allowed for her maintenance out of the testator's estate; and in the exercise of that discretion to have regard to the testator's intention that the burden of that maintenance should fall equally upon John

Matthew Vincent Smith and the said Lucy Smith and to the respective rights of the plaintiff and his children under Lucy's will; and to the question of what is a fair division of the burden of the said maintenance between the two estates.

Griffith C.J. and O'Connor J. held that Alice Smith was in respect of the two funds available for her maintenance in the position of a quasi creditor, and accordingly that as between such two funds the equitable doctrine of contribution ought to be applied, the proposition being thus stated by Griffith C.J.: "I do not know of any case in which this rule" (i.e., the rule as to equitable contribution) "has been formally applied to a case like the present, but I cannot doubt that it applies, at least to the extent that the trustees of either fund were entitled to insist upon a bona fide exercise of discretion by the trustees of the other, and that any person beneficially interested in either fund was entitled to call for such exercise by the trustees of both." They also held as a matter of construction that the testator (and per O'Connor J. that the testatrix also) had expressed an intention that the burden of Alice Smith's maintenance should fall equally upon the appellant John Matthew Vincent Smith and the said Lucy Smith. They further held upon the evidence that the appellants had (in the words of Griffith C.J.) "never applied their minds collectively to all the circumstances of the case, and especially to the question of what was fair as between the persons interested in the two estates or as between the plaintiff and Vincent" (i.e., the appellant John Matthew Vincent Smith) "or to the fact that the testator intended that Vincent should always bear one-half of the burden of Alice's maintenance."

Isaacs and Higgins JJ., dissenting from these views, held that the plaintiff was not a cestui que trust under the first will; that the trustees of that will had no obligation towards him; that neither directly nor indirectly, neither in his own name nor in the name of the trustees of Lucy Smith, could he call upon the testator's trustees to exert their powers with a view to his special benefit; that there was no nexus of obligation between the two sets of trustees as to the allowance to Alice, and that the equitable doctrine of contribution did not apply. They further held that (the plaintiff's case being not that the appellants had

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failed to exercise their discretion but had improperly exercised the same) the onus of proving any corrupt or improper motive on the part of the appellants in the exercise of their discretion lay upon the plaintiff, and that he had not discharged such onus.

Upjohn, K.C., and *Austen-Cartmell*, for the appellants, contended that on the evidence they had honestly exercised the discretionary powers conferred on them; that they owed no duty under the trusts of their will except to the beneficiaries thereunder; that they were not bound to pay any regard to the provisions of Lucy's will, and that the plaintiff could have no ground of complaint against them unless he could substantiate a case of fraud. No case had been made for equitable contribution by the two estates, their obligations being separate and the discretion conferred being vested in separate trustees to be exercised under different circumstances.

Alexander Grant, K.C., and *Howard Wright*, for the respondents the plaintiffs Cock and his trustee, contended that there had been no exercise by the appellants of the discretion conferred on them jointly by the first will; or that, if there had been, it had been unfair and unreasonable. The reasonable inference from their conduct was that they had reduced the allowance for Alice's maintenance with the object of benefiting the appellant John Matthew Vincent Smith and not bona fide for the purposes for which a discretion had been vested in them. They were bound in every year to exercise an individual and a joint discretion and had not done so. The judgment of the majority was right as regards the matters to which the appellants ought to have had regard in the exercise of their discretion and also in regard to the application of the doctrine of equitable contribution. Reference was made to *Re Beloved Wilkes' Charity*. (1)

Upjohn, K.C., in reply.

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The judgment of their Lordships was delivered by

LORD MERSEY. The real question in this case is whether the appellants, John Matthew Vincent Smith, Harry Emmerton, and William Aitken, who are the trustees under the will of John

(1) (1851) 3 Mac. & G. 440.

Matthew Smith, deceased, have lawfully exercised the discretion reposed in them by the terms of the will in relation to a trust for the maintenance of one of the testator's daughters. The facts are as follows: On April 21, 1898, John Matthew Smith died, having made his will, dated March 11, 1896, by which he left all his property to the appellants upon trust to sell and get in the same and to dispose of the proceeds in manner therein set out. Dealing with the disposal of the proceeds the will provides as follows: "And as to eight hundred pounds a year during the life of my daughter Alice Smith upon trust from time to time to apply the same or such part as my trustees may think fit for the personal maintenance and support or otherwise for the personal benefit of the said Alice Smith or to pay the same or such part as they shall think fit to her or to any other person to be so applied without liability on the trustees' part to enquire into the application thereof or at the option of my trustees to pay the whole or such part to my executors to be applied as part of the residue and ultimate surplus hereinafter mentioned."

It will be observed that this trust enables the trustees to apply the whole or any portion of the 800*l.* to Alice's maintenance, or to allow the whole to fall into residue. The will then provides that the "residue and ultimate surplus" shall be held in trust for the testator's son and daughter, John Matthew Vincent Smith (one of the appellants) and Lucy Smith, in equal shares and absolutely. The estate was sworn for probate at 240,000*l.*, and the residue was of the value of 110,000*l.* The daughter Alice Smith was an invalid, and on the death of her father she went to reside with her sister Lucy. From this time onwards and until the death of Lucy, the appellants acting under this trust paid to Lucy Smith the sum of 400*l.* in each year for the maintenance of Alice Smith. Lucy Smith died on November 12, 1903, leaving a will which was dated April 6, 1900. By this will she devised and bequeathed her real and personal estate to the appellants, John Matthew Vincent Smith and William Aitken, upon trust to convert the same into money, but with a proviso that her house "Castlefield" should not be sold during her sister Alice's lifetime, but should be maintained by the trustees as a residence for Alice.

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The will then directed that the trustees should stand possessed of the trust moneys "upon trust after payment thereout of such sum or sums as they shall from time to time in their absolute and uncontrolled discretion think fit to pay or apply in or towards the upkeep of my said Castlefield house and property and the rates taxes insurance and other outgoings in respect thereof and in and towards the maintenance and personal support of my said sister during her life . . . . to pay the residue of the income of the said trust premises to my nephew, Charles Matthew Germain Cock."

After the death of Charles Cock the corpus was to go in equal shares to his children. The gentleman here named—Charles Matthew Germain Cock—is the first respondent on the record in the present appeal, and he was the original plaintiff in the action. He is a grandson of John Matthew Smith. Since action commenced he has become insolvent, and the trustee of his estate (John McAlister Howden) has been added as a co-plaintiff.

Lucy Smith left real and personal estate valued at about 92,500*l.*, a large part of which was derived from her father's estate. John Matthew Vincent Smith renounced probate of Lucy Smith's will, and probate was granted to the appellant William Aitken alone. Subsequently, namely, on November 10, 1904, the respondent Alfred John Noall was appointed a trustee of Lucy's will to act jointly with William Aitken; and they are the trustees of her will at the present time.

Since Lucy Smith's death Alice Smith has continued to reside at Castlefield, and the trustees of Lucy's will have paid from 700*l.* to 800*l.* a year in the upkeep of the house and in and towards Alice Smith's maintenance. Meanwhile the appellants (the trustees under the will of John Matthew Smith) have reduced the allowance made by them in respect of Alice Smith's maintenance from 400*l.* to 100*l.* a year. To this state of things Mr. Cock objects. The effect of the payment out of Lucy Smith's estate of 700*l.* or 800*l.* a year is of course, pro tanto, to lessen the amount of Mr. Cock's annual income from the estate; and he apparently thinks that, if the trustees under the father's will can be compelled or induced to pay more than 100*l.* a year towards Alice's maintenance, the trustees under Lucy's will will

pay less, and so his income will be greater than it now is. Alice Smith, the beneficiary, has made no complaint against either set of trustees, nor has the one set of trustees made any complaint against the other; the complaint is by Mr. Cock alone and by the trustee of his insolvent estate. For some time Mr. Cock tried by expostulation to induce the appellants to increase the allowance from John Matthew Smith's estate, but without success, and on October 17, 1907, he issued his writ in this action to compel them to do so. He made the trustees of the will of John Matthew Smith the first defendants, adding also the trustees of the will of Lucy Smith, Alice Smith (the beneficiary), and lastly his own infant children. It is unnecessary to set out his cause of action, as disclosed in his pleadings in the action. His complaint is summarized with sufficient accuracy, and in sufficient detail, in the sixth paragraph of his case filed in answer to the present appeal, which is in the following words:—"The reduction in the allowance out of the estate of John Matthew Smith to Alice Smith was made by John Matthew Vincent Smith and Henry Emmerton, two of the trustees of his will, not in the bona fide exercise of the discretion conferred on them by the will, but with the object of throwing, in the interests of John Matthew Vincent Smith, a greater burthen on the estate of Lucy Smith in relief of the burthen on the estate of John Matthew Smith . . . . and the third trustee, William Aitken, did not exercise his discretion at all in the matter."

He claimed a declaration that the three trustees, or alternatively that the first two of them, had improperly, unfairly, and unreasonably, and in breach of their duties as trustees, exercised or purported to exercise the powers and discretion given by the will, and he asked for an order that the amounts necessary for the proper maintenance and support of the defendant Alice Smith should be provided out of the said two separate funds either in proportion to the respective amounts of such funds or by allotting 400*l.* a year out of the income of John Matthew Smith's estate and the balance out of the income of Lucy's estate, or otherwise as the Court should think just.

These being the facts, the case came on for trial before

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Hood J. in December, 1908. All the parties were represented with the exception of Alice Smith, who did not appear. The plaintiff gave evidence himself and called William Aitken, one of the appellants, to support his case. The defendants called no evidence. After argument the learned judge on February 8, 1909, dismissed the action, holding that the plaintiff had made out no case and holding further that the appellants owed no duty to the plaintiff in connection with the trust created by the will of John Matthew Smith. From this judgment there was an appeal to the High Court of Australia. That Court, which consisted of four judges, allowed the appeal; two judges, one of whom was the Chief Justice, taking the view that the plaintiff was entitled to judgment, and the other two taking the view that the present appellants were entitled to judgment. The Chief Justice gave his casting vote in favour of the appeal.

The questions of fact litigated before the judge of first instance were two. The first was whether the discretion vested in the trustees of the will of John Matthew Smith had been exercised at all. The second was whether, if so, it had been honestly exercised. As to the first of these two questions it was said that the discretion required by the will was to be a joint discretion of all three trustees, and that one of them, William Aitken, had never consented to the reduction to 100*l.* a year. It was in order to prove this allegation that William Aitken was called as a witness. The learned trial judge heard and saw this witness and came to the conclusion that he had consented to the reduction. A careful examination of the judge's note of the evidence satisfies their Lordships that this was a right conclusion. The effect of the evidence is clear. It is that up to Lucy Smith's death the allowance in respect of Alice out of J. M. Smith's estate had been at the rate of 400*l.* a year. After Lucy Smith's death the question as to what the allowance should be in the future was discussed. Emmerton thought it ought to be discontinued altogether, but he was willing that it should be continued at the reduced rate of 100*l.* a year. Smith thought it ought to be fixed at 200*l.* a year. Aitken thought the existing allowance of 400*l.* a year should not be disturbed. In these circumstances counsel's opinion was taken, but with no result, for the views of the three remained

unchanged. This was in or about February, 1904. Then Smith had an interview with Aitken at which he pointed out that both he and Aitken were interested in the matter (he as being entitled to one half of the residue of J. M. Smith's estate and Aitken as being one of the executors and trustees of Lucy Smith's will), whereas Emmerton was "neutral." Smith then, according to Aitken, suggested that it would be right to adopt Emmerton's view. Aitken, after giving his account of the interview, adds in his evidence, "I thought this a feasible way to look at it and so gave way." From this time onwards the allowance from J. M. Smith's estate was paid at the rate of 100*l.* a year, Aitken himself drawing out the cheques and the trustees signing them. In the face of this evidence it is impossible to say that Aitken did not consent to the reduction. He thought it wise to adopt the view of the "neutral" Emmerton. He withdrew his own opinion and thenceforward he concurred in payment at the rate of 100*l.* a year. It may be that he still thought it would have been better to continue the payment at 400*l.* a year, but there can be no doubt that he consented to and approved of the payment at the lower rate. Regard cannot be had to any secret reservations that may or may not have been in the minds of any of the three men; the question of whether they arrived at a common understanding must be judged of solely by what they did.

But then it was said that the exercise of the discretion was not honest. This point was not very seriously insisted upon by the respondents' counsel, nor, indeed, could it be. It rested, so far as J. M. V. Smith was concerned, upon the mere fact that in reducing the payment he was benefiting himself. No doubt he was benefiting himself, for by reducing the payment he was increasing the residue of the testator's estate, in which residue he was personally interested to the extent of one half. But this fact standing alone proves nothing. If it were connected with other circumstances tending to shew that J. M. V. Smith was influenced by a desire to benefit himself at the expense of his cestui que trust it would be worthy of consideration, but it is not. Moreover, when the testator created the trust, and gave to the trustees a discretion to pay to Alice less than 800*l.* a year, he must have foreseen that the very result might happen which is now relied

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upon as proof of some sinister motive on J. M. V. Smith's part. The judge of first instance held that no dishonest motive had been brought home to J. M. V. Smith. Their Lordships are of opinion that this finding was also right, and that there is no ground for the suggestion that Smith had acted otherwise than quite honestly.

Allegations of bad faith were made before the judge of first instance against Emmerton and Aitken, but they were so frivolous as to be unworthy of notice. They were not insisted upon by the counsel who appeared to support this appeal, and in their Lordships' opinion they ought never to have been made. There is, however, one point in the case which appears to have commended itself to the Chief Justice, and which it is desirable to deal with. It was said that, there being two trust estates from which payments towards the maintenance of one and the same cestui que trust were to be drawn, the doctrine of equitable contribution ought to be applied by apportioning the payments between the two estates. Without attempting to give a comprehensive definition of the expression "equitable contribution," it is clear that the present case does not fall within it. Before there can be any question of contribution there must be a common obligation upon those who are required to contribute. Here there is none. The trusts are not only different in their terms, but each trust requires a separate and independent exercise of the discretion of the trustees of the particular estate as to the sum to be paid by that estate to Alice. When that discretion has been exercised it may be said that a consequent obligation arises to pay the amount, but it is a separate obligation which has no connection with the obligation upon the trustees of the other estate, and cannot therefore afford any ground for a claim to contribution. The order appealed from seems to require the two sets of trustees to meet together and fix the amount to be paid to Alice and then to apportion the amount between the two estates. This would cause the sum payable by each estate to depend upon the joint discretion of two sets of trustees, a state of things never intended either by John Matthew Smith or by Lucy Smith. It would be to defeat instead of to carry out the intention expressed in the wills which create the trusts.

The terms of the trust in J. M. Smith's will require the appellants to exercise their own joint discretion in fixing the sum to be paid for Alice Smith's maintenance, and, of course, to do it honestly. This they have done. Their duties are, therefore, discharged, and no action lies against them.

For these reasons their Lordships are of opinion that this appeal should be allowed, and they will humbly advise His Majesty accordingly.

The order of the Court below is in two parts, the first relating to the method by which income and corpus should be distinguished in the accounts kept by Lucy Smith's trustees for the purpose of regulating the rights of Mr. Cock and his children inter se; the second relating to the method of discharging the trusts of J. M. Smith's will. It was suggested at the end of the argument before their Lordships that, in the event of the appeal being allowed, it would be necessary only to discharge the second part of the order. But the two parts in reality form only one order, and, therefore, the whole of it must be discharged, and the judgment of the judge of first instance must be restored. The respondents Cock and Howden must pay the appellants' costs in the Courts below and of this appeal.

Solicitors for appellants: *Light & Fulton.*
Solicitors for plaintiff respondents: *Harwood & Pusey.*

[PRIVY COUNCIL.]

J. C.* 1910 Nov. 22, 23, 24. 1911 Feb. 3.

THE KING . . . . . PLAINTIFF;

AND

CANADIAN PACIFIC RAILWAY COMPANY. DEFENDANTS.

THE MINISTER OF PUBLIC WORKS OF THE PROVINCE OF ALBERTA . . . . PLAINTIFF;

AND

CANADIAN PACIFIC RAILWAY COMPANY. DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Dominion Act 44 *Vict. c.* 1 — *Railway Construction Contract, cl.* 16 — *Exemption of Lands from Taxation—Twenty Years from Crown Grant—Until sold or occupied—Construction.*

The lands in suit within the North-West Territories formed part of a land subsidy earned by the respondents under their railway construction contract in 1881 with the Dominion, ratified by Dominion Act 44 Vict. c. 1. By clause 16 it was provided that the said lands should be free from taxation as therein described "until they are either sold or occupied . . . . for twenty years after the grant thereof from the Crown":—

Held, in two actions brought to enforce two separate claims on behalf of the Province of Alberta, which was carved out of the North-West Territories and established in 1905, to tax the said lands, that on the true construction of the contract they were exempt.

It was admitted that the lands had never been occupied; though there had been three agreements for sale, they had all been duly avoided and annulled in pursuance of authority contained therein. The earliest grant to the company from the Crown by letters patent under the Great Seal was in 1903, and the period of exemption ran at the earliest from that date and not from the identification by the Surveyor-General in 1884 of the said lands as part of the appellants' subsidy.

Rural Municipality of Cornwallis v. *Canadian Pacific Ry. Co.*, (1890) 19 S. C. R. 702, and *North Cypress* v. *Canadian Pacific Railway*, (1903) 35 S. C. R. 550, approved.

Two appeals from two judgments of the Supreme Court of Alberta (January 21, 1910) affirming in the first case a judgment of Beck J. (January 19, 1910) and in the second a

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judgment of Scott J. (December 30, 1909) and dismissing both actions.

The question in both actions was whether under the circumstances detailed in the judgment of their Lordships certain lands comprised in the said actions were liable to taxation under the Local Improvement Ordinance of the North-West Territories and under the Local Improvement Act of the Province of Alberta.

In the first action, the point decided was whether the lands had been sold by the respondents within the meaning of clause 16 of the contract (scheduled to 44 Vict. c. 1), which purported to exempt them from taxation. In the second action the point decided was whether the twenty years exemption provided by the said clause ran from the respective dates (April 6, 1903, being the earliest) of the issue of letters patent in respect thereof, or from the date (June 18, 1884) when the lands prior to the issue of the patents were identified by the Dominion Government surveyor as lands which the company had earned under their construction contract.

Beck J., the trial judge in the first action, dismissed it for the following reason: "I dismiss the action without costs. I do this without argument because counsel on either side quite understand that I am bound by the decision of the Supreme Court of Canada in *Rural Municipality of Cornwallis* v. *Canadian Pacific Ry. Co.*" (1)

The Supreme Court dismissed the appeal, saying, "The learned trial judge dismissed the action because it was admitted that the case came within the decision of the Supreme Court of Canada in *Rural Municipality of Cornwallis* v. *Canadian Pacific Ry. Co.* (1), and for the same reason the appeal is now dismissed, but without costs, no costs being asked."

In the second action Scott J., the trial judge, and in appeal the Supreme Court dismissed the action, following the decision of the Supreme Court of Canada in *North Cypress* v. *Canadian Pacific Railway.* (2)

Danckwerts, K.C., S. B. Woods, K.C., Hamar Greenwood, and *Horace Douglas,* for the appellants in both cases, contended that

(1) 19 S. C. R. 702. (2) 35 S. C. R. 550.

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the respondents had been duly assessed for taxes under the Local Improvement Acts of the North-West Territories and of Alberta in respect of certain lands in suit in the said province for the years 1905—1908. During those years the lands were not exempt from taxation, for they had been already sold by the respondents within the meaning of clause 16 of the contract. The evidence shewed that in 1902 one Schaetzel in the State of Illinois applied in writing to the respondents to purchase them, that the respondents accepted the offer, and three separate agreements were entered into between them. There were words on them "contract null and void for default dated 1st Nov., 1905. J. L. Doupe, Ass. Land Commissioner," but they had been placed on them by the respondents subsequently. Meanwhile the purchaser had paid and the respondents had received part of the purchase-money, which they still retain. It was contended that the construction placed upon the word "sold" in clause 16 by the Supreme Court of Canada in *Rural Municipality of Cornwallis* v. *Canadian Pacific Ry. Co.* (1) was not the true construction. It ought to have been held in reference to that section that the exemption from taxation which it provided ceased as soon as the payment of taxes thereupon or on portions of it ceased to be a burden on the company. It ceased in this case as soon as a valid contract of sale was made. The exemption did not re-attach to the property by reason of any act of the company in retaking dominion over the land. When it retakes such dominion it does so subject to its ordinary liability to taxation. In the second case it was contended that twenty years had elapsed from the date of the Government grant of the lands before the assessment was made in respect of 1905—1908. The period ran from June 18, 1884, when the lands were identified by the Government surveyor as lands allocated to the respondents under their contract. It was contended that the construction placed on clause 16 in the case of *North Cypress* v. *Canadian Pacific Railway* (2), to the effect that "grant thereof from the Crown" was equivalent to the issue of letters patent by the Crown, was wrong. The issuing of letters patent is merely the ministerial act which evidences the grant and is not the grant

(1) 19 S. C. R. 702. (2) 35 S. C. R. 550.

itself. The construction objected to involves the Crown in breach of trust with its subjects in Alberta by having unduly delayed to their prejudice the issue of the letters patent. The evidence shewed that during the period of delay and ever since June 18, 1884, the respondents had dealt with the said lands as owners. Reference was made to *Attorney-General* v. *Brunning* (1); *Shaw* v. *Foster* (2); *Lysight* v. *Edwards* (3); *Rayner* v. *Preston* (4); *Platt* v. *Union Pacific Co.* (5); *Government of Newfoundland* v. *Newfoundland Ry. Co.* (6); *Swamplands Case.* (7) Upon the point that sale is effected by contract, the actual conveyance being a subsequent addition, they referred to Fry on Specific Performance, s. 1392, and Sugden's Vendors and Purchasers, 14th ed., p. 100.

Sir R. Finlay, K.C., J. S. Ewart, K.C., Creelman, K.C., Tupper, K.C., and *Geoffrey Lawrence,* for the respondents, contended in the first appeal that the transactions relied upon by the appellant did not constitute sale within the meaning of clause 16. They distinguished between a sale and an agreement to sell. The former implies the completion of the latter and the actual transfer of proprietary right with all its incidents. The intention of the clause was that the respondents should benefit by exemption, but not their purchasers. That intention would be defeated if "sale" is construed to include an executory contract which is never executed, for it will pro tanto destroy, while the lands are legally and beneficially the property of the respondents, the exemption which is conferred by the contract. In the second appeal they contended that the exemption from taxation ran from the date of conveyance (the earliest being in 1903) by letters patent. The grant of the letters patent was essential to pass the title. The contract merely contemplated a transfer in futuro after survey and appropriation which frequently involved difficult negotiations of selected lands to be carried out by conveyances; and that course of dealing has been invariably observed between the Government and the company. Reference was

(1) (1860) 8 H. L. C. 243.
(2) (1872) L. R. 5 H. L. 321.
(3) (1876) 2 Ch. D. 499.
(4) (1881) 18 Ch. D. 1.
(5) (1878) 99 U. S. 48.
(6) (1888) 13 App. Cas. 199.
(7) [1904] A. C. 799.

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made to 42 Vict. c. 31, s. 21, to shew that in the case of the Hudson's Bay Company's lands, where the intention was that the contract should pass title without letters patent, express provision was made to that effect. Without that express provision there was no valid grant till the letters patent were issued. They relied upon the Supreme Court judgments cited from 19 S. C. R. and 35 S. C. R., and on the meaning and use of the words "grant from the Crown" they referred to Dominion Lands Act, 1879 (42 Vict. c. 31, s. 76); Public Lands Act, R. S. O. (1877), c. 23, s. 26; Registry Act, R. S. O. (1877), c. 111, ss. 38 and 61; the Manitoba Act, Stat. of Can. (1870), c. 3, s. 32, sub-ss. 1 and 2, and s. 33.

S. B. Woods, K.C., in reply.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The two actions which have given rise to these appeals were brought to enforce two separate claims by or on behalf of the Province of Alberta to tax certain lands belonging to the Canadian Pacific Railway Company. The lands in question formed part of the land subsidy earned by the railway company in the construction of their railway. In 1881, when the construction contract was approved and ratified by an Act of the Dominion Parliament (44 Vict. c. 1), the district in which the lands are situated was part of the region known as "the North-West Territories." The Province of Alberta, which was carved out of the North-West Territories, was not established until the year 1905.

Though the questions involved in the two actions are quite distinct they both turn on the wording of clause 16 of the construction contract. That clause is in the following terms:—

"16. The Canadian Pacific Railway and all stations and station grounds workshops buildings yards and other property rolling stock and appurtenances required and used for the construction and working thereof and the capital stock of the company shall be for ever free from taxation by the Dominion or by any province hereafter to be established or by any municipal corporation therein; and the lands of the company in the North-West Territories until they are either sold or

occupied shall also be free from such taxation for twenty years after the grant thereof from the Crown."

In the first appeal, which is brought in the name of His Majesty the King in the right of the Province of Alberta, the question turns upon the meaning of the word "sold" as used in that clause.

It seems that in September, 1902, the railway company agreed to sell to one Schaetzel three sections of land which had been conveyed to the company by letters patent from the Crown, dated July 20, 1901. There were three agreements. The price of one of the sections was $1644, the price of each of the others was $1920. On signing the agreements, a payment of $320 was made by the purchaser in respect of each section. The remainder of the purchase-money was to be paid in five equal annual instalments at fixed dates specified in the agreements. In each case time was made of the essence of the contract, and each agreement contained a provision that if the purchaser should fail to make the stipulated payments, or any of them, within the times limited for payment, the company should have the right to declare the contract null and void by notice in writing to that effect personally served on the purchaser or mailed in a registered letter addressed to him at a post office named in the agreement.

Besides the three sums of $320 paid on the execution of the three agreements nothing was ever paid by the purchaser towards the purchase-money; and on November 1, 1905, the company duly declared the three agreements null and void.

It is admitted that the lands have never been occupied within the meaning of clause 16.

The contention on the part of the appellant is that although there was no sale in fact, and although each of the three agreements for sale was duly avoided and annulled in pursuance of authority contained in the agreement itself, yet the lands have been sold within the meaning of that expression in the construction contract.

So strange a contention does not seem to require a serious answer. But an answer may be given in the language of Ritchie C.J., who disposed of the point when it was raised in

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1891 before the Supreme Court. "There must have been," said that learned judge, "a completed sale, and the property must have passed out of the Canadian Pacific Railway Company and vested in the purchaser before it could become liable to taxation": *Rural Municipality of Cornwallis* v. *Canadian Pacific Ry. Co.* (1)

The action which gave rise to the second appeal was brought by the Minister of Public Works of the Province of Alberta for the purpose of determining the date from which the period of exemption mentioned in the latter part of clause 16 is to be reckoned. In the case of "the lands of the company in the North-West Territories" which have not been sold or occupied the period of exemption is defined as a period of "twenty years after the grant thereof from the Crown." The proper meaning of the expression "grant from the Crown" in the case of a land grant is a conveyance by letters patent under the Great Seal. And although, of course, Crown lands may be transferred to a subject by Act of Parliament, such a transfer would not ordinarily or properly be described as a "grant from the Crown."

The contention on the part of the respondent is that in the case of lands proposed to be taxed the period of exemption must be reckoned from the date of the letters patent conveying those lands to the company. The earliest patent in the present case is dated April 6, 1903.

The contention on the part of the appellant is that the period of exemption runs not from the date of the conveyance of the lands now proposed to be taxed, but from June 18, 1884, the date on which the survey of these lands was approved by the Surveyor-General of Canada, and the lands were thus identified as part of the subsidy in land to which the company was entitled.

It was one of the conditions of the construction contract that grants in respect of the land subsidy should be made in alternate sections of 640 acres extending back twenty-four miles on each side of the railway—the company receiving the sections bearing uneven numbers. It was, however, provided that if any of such sections "consisted in a material degree of land not fairly fit for

(1) 19 S. C. R. 702.

settlement" the company should not be bound to receive them as part of such grant. This provision led to prolonged discussion and negotiation between the company and the Government. Some lands which the company at first rejected were afterwards accepted, and some that were at first accepted were rejected afterwards. The result was that in a considerable number of cases the destination of lands appropriated to the land subsidy was not definitely fixed until long after the date when the survey was approved in the Surveyor-General's office. As the learned counsel for the respondent pointed out, there would have been much complication and confusion if the construction contended for by the appellant had been adopted.

In point of fact, however, whenever the question has been argued in the Canadian Courts the ordinary and proper signification of the expression " grant from the Crown " has been adopted. The leading case is the case of *North Cypress* v. *Canadian Pacific Railway*. (1) In deference to the decision of the Supreme Court of Canada in that case, formal judgments only were delivered by the trial judge, and by the learned judges in the Supreme Court of Alberta, from which the second appeal is brought.

It was argued that if the expression " grant from the Crown " was to have its proper and ordinary signification it would be in the power of the railway company, by delaying to accept Crown grants or even by simply abstaining from pressing for such grants, to defer their liability to taxation for an indefinite period. It must, however, be remembered that at the time when the construction contract was made lands in the North-West Territories were the property of the Dominion, and that any delay in perfecting Crown grants would be the fault of Dominion officers. The circumstance that but for the contract the lands would now be liable to taxation for provincial purposes cannot alter the rights of the railway company, nor does that fact of itself necessarily lead to delay in perfecting the grants.

The whole contract was subjected to a very close and critical examination, but their Lordships are satisfied that there is no reason for departing from the ordinary and proper signification of the expression " grant from the Crown."

(1) 35 S. C. R. 550.

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Their Lordships are therefore of opinion that in the case of lands not sold or occupied the period of exemption from taxation mentioned in clause 16 of the construction contract runs in each case from the date of the letters patent conveying the lands to the railway company.

Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed.

In accordance with an agreement between the parties there will be no order as to the costs of the appeals.

Solicitor for appellant: *George Hamilton.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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NATIONAL PHONOGRAPH COMPANY OF AUSTRALIA, LIMITED . . . . . } PLAINTIFFS;

AND

WALTER T. MENCK . . . . . DEFENDANT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Commonwealth Patents Act, 1903, *s.* 62—*Sales of Patented Articles to Jobbers and Dealers — Infringement by Dealer of Patentee's Rights — Rights of Patentee—Condition imposed upon Dealer.*

The appellants held patents granted under the Commonwealth Patents Act, 1903, for improvements in phonographs, sound records or blanks, and in the production of the two latter articles, and under s. 62 were entitled by way of monopoly by themselves, their agents and licensees, "to make, use, exercise and vend the invention . . . . in such manner as to him seems meet."

It appeared that their course of business was to sell their patented articles to jobbers, who in turn sold to dealers, the dealers' contracts being made with the appellants. The main object of those contracts was to prevent undercutting of trade prices and also the introduction of rival goods by way of exchange. The respondent held various dealers' contracts made in April and May, 1906, and was entered on the appellants' dealers' list under a dealers' contract which rendered him liable to be

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withdrawn therefrom on violating any of the conditions of sale therein expressed or any other reasonable conditions which might from time to time be imposed. If so withdrawn, he undertook that he would in no way "handle, sell, or deal in or use, either directly or indirectly," the patented articles unless authorized to do so in writing by the appellants.

In an action to restrain the respondent, whom the appellants had removed from their dealers' list, from (1.) acting in breach of contract, (2.) infringing their patent rights, their Lordships approved the finding by the High Court that no violation by the respondent of his contract had been established :—

Held, therefore, that he was free from those contractual obligations to the appellants, resulting from the withdrawal of his name from the dealers' list, which imposed upon him a comprehensive restraint on his conduct as a trader. But *held*, also, that the appellants were entitled under the statute to impose conditions in transactions of making, using, and vending their patented articles; that knowledge of those conditions was brought home to the respondent by the said contract; and that he could not deal therewith as ordinary articles of commerce free from the conditions so imposed.

APPEAL by special leave from a judgment of the High Court (October 26, 1908) in pursuance of which Isaacs J. entered judgment for the respondent (November 10, 1908).

The action was brought on May 28, 1907, by the appellants, a company incorporated under the New South Wales Companies Acts, 1899 and 1900, to restrain the respondent from infringing the appellants' patent rights and from acting in breach of his contract with them, under the circumstances which are stated in the judgment of their Lordships.

The specific complaints were that the respondent had sold their goods for less than the listed retail prices, and since the removal of his name on July 28, 1906, from their dealers' list had handled, sold, or dealt in and used Edison phonographs, records, and blanks without the appellants' authority.

The respondent denied the alleged breaches of his agreements. He contended that, even if he ever had in his possession or offered or exposed for sale or sold goods of the appellants' make under their letters patent, he had lawfully acquired those goods by purchase, and that they had been sold by the appellants with the right in every purchaser of them of sale or resale, and that his possession, offering or exposing for sale, or his selling was no infringement of the appellants' letters patent. He contended

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that, if in fact the appellants had removed his name from their dealers' list, such removal was wrongful. He also contended that the restriction upon the respondent's freedom to handle, sell, deal in, or use Edison phonographs and parts, records, and blanks after the removal of his name was void as in restraint of trade.

By their reply the appellants admitted that the goods had been sold by them, but alleged that such sales were subject to the express terms and conditions that the purchaser should not sell or offer for sale, either directly or indirectly, except at prices not less than certain specified prices, and that no purchaser acquired any right to sell or expose or offer for sale except at those prices, and they alleged that the respondent had failed in the instances given to comply with those terms. They also alleged that it was a further express term and condition of such sales that, in the event of a dealer's name being removed from the dealers' list, he would not handle, sell, deal in, or use such goods without written authority.

Patents of invention in Australia are regulated by the Commonwealth Patents Act, 1903, which like English patent law is based on the Statute of Monopolies. The Australian statute so far as material to the matters in issue in this appeal is in terms identical with the British Patents, Designs and Trade Marks Act (46 & 47 Vict. c. 57), and O'Connor J. in his judgment in the Court of Appeal stated that in the absence of expressions to the contrary it would be taken that the Commonwealth Legislature in adopting the form of expression used in the English Acts from the Statute of Monopolies downwards had used them in the sense which the British Courts have always attached to them.

Isaacs J. found on the evidence that no sale in the ordinary sense of the term at less than the listed prices had been proved against the respondent; that since the removal of his name from the dealers' list he had dealt in goods of the appellants' production, but that no special or substantial damage or loss of custom had been proved, the evidence shewing that full prices had been received by him.

The High Court in appeal held that the appellants' right was

founded on s. 62 of the Commonwealth Patents Act, 1903; but by a majority of four to one decided that the section must be read as giving a power, privilege, and authority only to be exercised according to existing law, and that the Patents Act did not grant to the patentee any power to impose conditions on the sale of a patented article which would run with the goods.

With regard to the alleged breaches of contract, all the judges of the High Court were of opinion that the dealers' agreements signed by the respondent constituted binding contracts between him and the appellants, but three were of opinion that the right of the appellants to remove the respondent's name from the dealers' list was upon the construction of the contracts a conditional and not an absolute right; that no event had occurred which justified the removal of his name by the appellants on July 28, 1906; and that therefore the dealings by the respondent in the appellants' goods after that date did not constitute actionable breaches of agreement.

A. J. Walter, K.C., and *J. H. Gray*, for the appellants, contended that the judgment of the High Court should be reversed. The appellants as owners of the letters patent had under the said s. 62 full power, sole privilege, and authority to sell their patented goods upon the terms of licences authorizing only a limited right to deal therewith. It was contended that such limited licence runs with such goods in the hands of all persons into whose possession they may come. Whether such persons acquire the patented goods with or without notice of the terms of such limited licence was immaterial. Their acting in breach of those limitations rendered them liable for infringing the appellants' statutory right under their patents. If a jobber or dealer sold those goods on terms and conditions other than those contained in the contracts under which they obtained delivery, he not merely committed a breach of contract, but he infringed the patents under which the goods were manufactured. He only acquired by his contract a limited right to deal with such goods, a limited right defined in express terms and conditions contained therein. The ownership of patented goods and its incidents must always be considered in reference to the

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patentee's exclusive rights, his power to exclude production of similar goods by others, and to impose conditions on the user of those produced under the patent. It was contended that any purchaser, whether he bought with or without notice of those terms and conditions, acquired no greater right than his seller could transfer, and consequently infringed the patent rights if he exceeded his powers. It was contended on the evidence that the respondent had acted in breach of his dealers' agreements and that he was liable both for breach of contract and for infringement of the patents. They referred to *Incandescent Gas Light Co.* v. *Cantelo* (1), to the effect that a patentee owner has absolute power to impose any conditions on the sale of his patented goods; *Incandescent Gas Light Co.* v. *Brogden* (2); *British Mutoscope and Biograph Co.* v. *Homer* (3); *Taddy* v. *Sterious* (4); *McGruther* v. *Pitcher* (5); *Badische Anilin und Soda Fabrik* v. *Isler* (6); *Steers* v. *Rogers* (7); *Betts* v. *Willmott* (8); *Basset* v. *Graydon* (9); *De Mattos* v. *Gibson.* (10)

Levinson, for the respondent, contended that the High Court was right in its finding that no breach of his dealers' agreement had been proved against him and that the appellants had not justified their removal of his name from their dealers' list. Such removal under the circumstances was a breach of contract on the part of the appellants and exonerated the respondent from his obligation thereunder to observe a comprehensive restriction of his dealings with and user of the patented articles in the manner prescribed thereby. Apart from the appellants' breach of agreement the words in the said contract which purported to prohibit the respondent from in any way handling, selling, dealing in, or using either directly or indirectly Edison phonographs, &c., were very wide in their scope and constituted an unreasonable restraint of trade and were unenforceable, especially so if the appellants' right to remove him from their list was, as all along contended by them, absolute and unconditional. It was not established by

(1) (1895) 12 Rep. Pat. Cas. 262.
(2) (1899) 16 Rep. Pat. Cas. 179, 183.
(3) [1901] 1 Ch. 671, 675.
(4) [1904] 1 Ch. 354.
(5) [1904] 2 Ch. 306.
(6) [1906] 1 Ch. 605.
(7) [1893] A. C. 232, 235.
(8) (1871) L. R. 6 Ch. 239.
(9) (1897) 14 Rep. Pat. Cas. 701, 713.
(10) (1858) 4 De G. & J. 276.

them by any of the cases cited that the licences granted ran with the goods. The appellants must shew a contract with any subsequent purchaser if they claim to enforce their conditions against him, or at least that he bought with notice thereof. Covenants and conditions cannot be attached to goods so as to run with them as certain covenants run with lands, and goods which are patented do not stand in this respect on a different footing. The full property in chattels can in this case only be limited in such manner as the patentee is authorized by the laws under which his patent was granted to enforce, and it was contended that on the evidence the respondent had not infringed any legal limitations on his right of ownership and sale, in other words the rights of the appellants under their patents. Reference was made to *General Billposting Co.* v. *Atkinson* (1) and *McGruther* v. *Pitcher.* (2)

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Walter, K.C., in reply.

The judgment of their Lordships was delivered by

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LORD SHAW OF DUNFERMLINE. This is an appeal brought in an action to restrain the respondent, Mr. Menck, from (1.) acting in breach of a certain contract between the parties, and (2.) from infringing the patent rights of the appellants, the National Phonograph Company of Australia. The facts were investigated by Isaacs J. and reported by him to the High Court of Australia, which delivered a judgment dismissing the action and finding the appellant company liable in costs.

The appellants own three patents for "improvements in phonographs," "improvements in the production of sound records or blanks," and "improvements in sound records or blanks." All of these patents were granted pursuant to the provisions of the Patents Act, 1903, of the Commonwealth of Australia.

Sect. 62 of the statute is to the following effect:—

"The effect of a patent shall be to grant to the patentee full power, sole privilege and authority, by himself, his agents, and licensees during the term of the patent to make, use, exercise, and vend the invention within the Commonwealth in such

(1) [1909] A. C. 118. (2) [1904] 2 Ch. 306.

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manner as to him seems meet, so that he shall have and enjoy the whole profit and advantage accruing by reason of the invention during the term of the patent."

Substantially nothing depends upon the particular wording of this section, or of the language of the First Schedule, which contains the form of a grant of patent, it being admitted by the parties that their rights are not varied by the differences, if any, between the language of the Australian and the British Patent Acts.

The application for an injunction has been accompanied on the part of the appellants by a series of charges and allegations against Mr. Menck of contravention of their rights, which have been rightly found to have no foundation. One of these charges, in fact, alone remains to be dealt with, and this will be subsequently referred to. It has also been accompanied by propositions in law and arguments and pleas of a highly controversial and delicate character, producing marked differences of opinion among the learned judges in Australia. Notwithstanding the insubstantial extent of the questions as matters of business which have been raised by the appellants, and the difficulty of seeing that they have, at least as yet, suffered the slightest patrimonial loss by the actions of Mr. Menck, it appears to their Lordships that, in view of the judgments of the Court below, in which the decisions of distinguished judges of the English Courts have been examined in much detail, it is expedient that the questions, more especially those dealing with the nature and effect of a patent grant, should be scrutinized and dealt with.

In the course of their business the appellants sold Edison phonographs, records, and blanks, made in accordance with, and under the protection of, the letters patent. Their mode of proceeding was to sell to jobbers under jobbers' contracts. Jobbers had power to sell to dealers, but the dealers' contracts were made direct with the appellants. Mr. Menck, the respondent, was a dealer and had various dealers' agreements dated April and May, 1906, and the appellants entered him in their dealers' list. The position of being upon this list appears to have been one of commercial importance. By the ninth head of the dealers'

agreement it was provided that "dealers violating any of the foregoing conditions of sale or any other reasonable conditions that may from time to time be imposed" by the appellants ". . . . may be at once withdrawn from the dealers' list." On the dealer's part, he undertook that "in the event of my name being removed from the dealers' list, I will in no way handle, sell, or deal in or use, either directly or indirectly, Edison phonographs and parts thereof, Edison records and Edison blanks, unless authorized to do so in writing" by the appellants.

There are, as stated, two questions which arise in the case. The first has reference to the allegation by the appellants that the respondent has acted in breach of this contract. The second —much more important in principle—is that he has acted in breach of their rights as patentees.

(1.) A considerable portion of the judgments and opinions of the learned judges of the High Court is occupied with the investigation of the transactions upon which the charges of breach of contract made by the appellants depended. Much weight must necessarily attach to the judgment of Isaacs J., in which these transactions were most carefully resumed. Their Lordships do not think it necessary to enter upon these details further than to state that they concur in the statement of the general result of his investigation made by that learned judge when he declares: "With regard to the breach of contract, whatever else may prove to be the legal relations of the parties, no special damage was proved, and indeed none of the alleged breaches were substantiated as laid." But Isaacs J., while holding this general opinion, is constrained, manifestly with reluctance, to hold that one breach of the agreement was "technically justified." He thus describes his position: "A more difficult consideration is whether the Beckett transaction was a violation of clause 4 or clause 6 of the agreement. On the facts found, no other alleged violation occurred, and the Beckett dealing was in any aspect a trivial matter upon which to hang such momentous consequences. But if it constitutes a violation, the removal of the defendant's name from the plaintiffs' list of dealers was technically justified by the contract." It may be said that upon the contract question, by three to two, the judges

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of the High Court held that no violation of the appellants' rights had occurred. The appellants might well, in their Lordships' opinion, have been content with this part of the judgment. They, however, challenged it, and it is accordingly necessary to deal with it.

One cannot peruse either the dealers' or jobbers' agreement without perceiving that the main object of those documents, so far as the appellants were concerned, was to secure that there should be no selling of their productions at less than their standard prices to the public. Commissions were fixed to jobbers and to dealers respectively, but, so far as the ordinary purchasers were concerned, no undercutting of prices was permitted. The appellants started their case with various allegations of undercutting, all of which have proved to be unfounded. As Isaacs J. has found, Menck never even contemplated such a thing, nor did he ever engage in that method of business, and whether the transactions were before or after his name being deleted from the dealers' list, that is the case. But a second object of the agreements was to secure by the prevention of exchange that the articles of rival manufacturers should not, by the assistance of jobbers or dealers, be, so to speak, put into circulation. The fourth condition accordingly is in these terms: "Exchanging or tendering Edison phonographs or parts, records or blanks, in whole or part payment for privileges of any character, or for advertising or for goods of some other make or nature, or the exchange or acceptance of merchandise of other make or nature in whole or part payment for Edison phonographs or parts, records or blanks, is not permitted. This does not prohibit the acceptance of a talking machine at full list price, if good as new, or less cost of repairs to make good as new, in exchange for an Edison phonograph sold at full retail list price; but does prohibit the acceptance of records or blanks of any kind, at any price, in exchange for Edison phonographs or parts, Edison records or Edison blanks." The appellants strenuously argued that the last portion of this clause prohibiting the acceptance of records or blanks of any kind at any price was absolute and universal. It is plain, however, that the clause deals with the introduction of rival goods into the market, goods spoken of thus:

"exchanging or tendering" Edison goods in whole or part payment for privileges or for advertising "or for goods of some other make or nature, or the exchange or acceptance of merchandise of other make or nature." Having made that general point clear, it is, however, added that "this does not prohibit the acceptance of a talking machine at full list price," and so on, "but does prohibit the acceptance of records or blanks of any kind at any price in exchange for" Edison goods. In the opinion of their Lordships, the majority of the learned judges of the Court below are right in holding that this is not a prohibition against one dealer in Edison goods, who happens to be out of one class of them, exchanging with another dealer who happens to have a surplus of the class needed, the condition being always observed that the transaction is regulated on the trade prices so as to prevent, first, any undercutting, and, secondly, the introduction of rival goods. It is found as a fact in this case that Mr. Menck, in one solitary and small transaction, exchanged a Gem phonograph of the appellants' make (worth a few guineas) for another of the appellants' phonographs and twenty-one records, these also being of the appellants' make. The exchange was arranged on the basis of the dealers' price list. "It was certainly not a wilful breach," and Mr. Menck made no profit from it. It is the view of their Lordships that such a transaction, apparently perfectly reasonable from the point of view of business, did not constitute a contravention of the agreement of parties.

When, therefore, the ninth condition of the contract sets out that dealers violating any of the foregoing conditions may be at once withdrawn from the dealers' list, and when Mr. Menck covenanted that, in the event of his name being removed from that list, he would in no way handle, sell, or deal in or use the Edison goods, it appears clear that, if the appellants are to found as matter of contract upon this comprehensive restraint on Mr. Menck's conduct as a trader, they must justify their withdrawal of his name from the list on the ground of having established that he has violated the contract. As it is not established that he has done so, and all the allegations to that effect have failed, it follows that the respondent stands free of obligations to the appellants in so far as these are contractual obligations.

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It was in these circumstances not unnatural that the respondent should consider himself as free as any ordinary member of the public with regard to the dealing in and selling of the appellants' goods. The second point of the case is thus reached.

(2.) Large portions of the contentions of the appellants, both in their written pleadings in the Court below, and as these may be supposed to be reflected in their stated case to this Board, consisted of propositions and views in law which are unsound, and their Lordships are not surprised that the learned judges of the High Court were put to great difficulty in endeavouring to disentangle such pleadings. On the other hand, the respondent, believing, and being possibly advised, that his position, there being no agreement which bound him, was that of an ordinary member of the public buying goods in the ordinary market, also put forward a view of the case which was lacking in soundness. On the one hand, the appellants not only maintained that they, as owners of the letters patent, could sell their goods upon terms and conditions importing only a limited right to deal with the goods, but they went the length of maintaining that such a limited licence "runs with such goods in the hands of all persons into whose possession they may come, and whether such persons acquired such goods with or without notice of the terms of such limited licence." On the other hand, the respondent maintained that a patentee imposing conditions upon the use or sale of his patented articles is not entitled "to enforce such conditions upon a subsequent purchaser of those articles apart from any contract with such subsequent purchaser." Two of the learned judges supported the former proposition, and three (the majority) of the learned judges supported the latter proposition. In their Lordships' opinion both propositions are unsound.

An examination is made by Griffith C.J. of the appellants' proposition, both from the point of view of principle and from an examination of the authorities. These authorities are examined in detail; certain observations are made upon the judgments therein, and the learned judge comes to the conclusion that he is not bound by the various dicta to which he refers.

It would rather appear accordingly that, standing the present judgment on the one hand and those English judgments or dicta

referred to on the other, a different conception might prevail with regard to the rights of a vendee of patented articles in Australia from that which prevails in England; and this would of course result pro tanto in a different administration of the law on the same subject. It may accordingly be as well, from that isolated point of view, that an appeal was taken to this Board.

To begin with, the general principle, that is to say, the principle applicable to ordinary goods bought and sold, is not here in question. The owner may use and dispose of these as he thinks fit. He may have made a certain contract with the person from whom he bought, and to such a contract he must answer. Simply, however, in his capacity as owner, he is not bound by any restrictions in regard to the use or sale of the goods, and it is out of the question to suggest that restrictive conditions run with the goods. The judgment of Swinfen Eady J. in *Taddy* v. *Sterious* (1) is plainly sound. It would be contrary to the public interest and to the security of trade, as well as to the familiar rights attaching to ordinary ownership, if any other principle applied.

The real point of difficulty is the enforcement of that principle without impinging upon something else, namely, the right of property granted by the State and by way of monopoly to a patentee, and his agents and licensees, "to make, use, exercise, and vend the invention, ... in such manner as to him seems meet." This is, of course, with reference to the grant of the right as a sole right, that is to say, put negatively, with a power to exclude all others from the right of production, &c., of the patented article, and also with reference to the imposition of conditions in the transactions of making, using, and vending, which are necessarily an exception by statute to the rules ordinarily prevailing.

In the opinion of their Lordships it is perfectly possible to adjust the incidence of ownership of ordinary goods with the incidence of ownership of patented goods in such a manner as to avoid any collision of principle. In their Lordships'

(1) [1904] 1 Ch. 358.

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view this has been done for a long period of years in England by decisions which are consistent and sound.

The learned Chief Justice, after dealing with the case of patent rights confined geographically to England, deals with the general subject of the sale of a patented article thus: he remarks that it has "come into lawful existence and circulation as a chattel, the owner of which is entitled to make such use or disposition of it as he pleases, unless forbidden by statute. Such an article may be regarded, to use the American phrase, as having 'passed out of the limit of the monopoly.'" It is accordingly plain that, if this doctrine be correct, the owner of patented goods which he has purchased could, notwithstanding his full knowledge at the time when he made the transaction of purchase as to conditions and restrictions having been attached by the patentee to the rights in the articles sold, maintain that the ordinary incidents of sale of a chattel should apply, and that these wiped such conditions and restrictions out, and that the purchaser, notwithstanding his knowledge thereof, stood free therefrom. The learned judge arrives at the same conclusion under his view of the word "vend," which he properly does not limit to the idea itself, but extends to the product of the invention. Commenting upon the argument that after "vending" the patentee may still have rights of restriction, &c., which bind the owner of the goods, he observes: "it would follow that, by the introduction of that word (vend) into the English Patents Act of 1883, a radical change was effected in the law of personal property, and that there came into existence a new class of chattels, to which is attached the quality or character of being inalienable without the consent of some person other than the owner, although that other has no right of property in them." There is no doubt that, if the doctrine contended for by the appellants and affirmed by the dissentient judges in the Court below were to be given effect to, namely, that the conditions imposed by the patentee run with the goods, a radical change in the law of personal property would have been made. But if that latter view be an extreme view, and if the restriction upon alienation, use, or otherwise of the chattel purchased be a restriction arising from the fact that the person who has become

owner has done so with the knowledge brought home to him of the limitation of his rights of alienation or otherwise, then there seems to be no radical change whatever. All that is affirmed is that the general doctrine of absolute freedom of disposal of chattels of an ordinary kind is, in the case of patented chattels, subject to the restriction that the person purchasing them, and in the knowledge of the conditions attached by the patentee, which knowledge is clearly brought home to himself at the time of sale, shall be bound by that knowledge and accept the situation of ownership subject to the limitations. These limitations are merely the respect paid and the effect given to those conditions of transfer of the patented article which the law, laid down by statute, gave the original patentee a power to impose. Whether the law on this head should be changed and the power of sale sub modo should be withdrawn or limited is not a question for a Court. It may be added that where a patented article has been acquired by sale, much, if not all, may be implied as to the consent of the licensee to an undisturbed and unrestricted use thereof. In short, such a sale negatives in the ordinary case the imposition of conditions and the bringing home to the knowledge of the owner of the patented goods that restrictions are laid upon him.

These principles harmonize the rights of the patentee with the rights of the owner. They are not, in their Lordships' opinion, novel, nor did they start, as might appear to be the view of the case law adopted by some of the judges in the Court below, with the judgment of Wills J. in the case of *Incandescent Gas Light Co.* v. *Cantelo.* (1)

Betts v. *Willmott* (2) was decided in the year 1871. In that case "the owner of an English patent manufactured the patented article in France as well as in England. In a suit to restrain the sale of the article in England, the plaintiff proved that it was not made at his manufactory in England, but could not prove that it was not made at his manufactory in France." It being incumbent accordingly on the plaintiff to prove not only the sale, but that the article was not made by himself or his agents, and he having failed in this proof, he failed in his suit.

(1) 12 Rep. Pat. Cas. 262. (2) L. R. 6 Ch. 239.

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In that case Lord Hatherley deals with the general point both as to what arises from the ordinary case of purchase of an article and also as to the case where a patented article is sold with notice of restrictions. "When a man," says his Lordship, "has purchased an article he expects to have the control of it, and there must be some clear and explicit agreement to the contrary to justify the vendor in saying that he has not given the purchaser his licence to sell the article, or to use it wherever he pleases as against himself." As to an ordinary vendee as distinguished from the mere agents of the patentee, what is required of the patentee is not only to shew "that there is some clear injunction to his agents, but that there is some clear communication to the party to whom the article is sold" of any restrictions in the rights. Accordingly these two points, first, as to the ordinary effect of a sale, with the presumption of the sale carrying everything, unless in the case of licensed goods there be clear agreement to the contrary; and, secondly, that that agreement must be not a communication to agents merely, but to the party to whom the article is sold, are made clear by that decision.

In 1883 the same two points appeared in the judgment of Cotton L.J. in *Société Anonyme des Manufactures de Glaces* v. *Tilghman's Patent Sand Blast Co.* (1)

Again in 1888, in *Heap* v. *Hartley* (2), Bristowe, Vice-Chancellor of the Palatine Court, followed up the two cases of *Betts* v. *Willmott* (3) and *Société Anonyme des Manufactures de Glaces* v. *Tilghman's Sand Blast Co.* (1) on exactly the same lines.

Then in 1895 there occurred the case of *Incandescent Gas Light Co.* v. *Cantelo.* (4) As the judgment has been much canvassed, and as, in their Lordships' opinion, it forms undoubtedly a leading authority in the law of England, these passages from the opinion of Wills J. may be cited: "The sale of a patented article carries with it the right to use it in any way that the purchaser chooses to use it, unless he knows of restrictions. Of course, if he knows of restrictions, and they are brought to his mind at the time of the sale, he is

(1) (1883) 25 Ch. D. 1, 9.
(2) (1888) 5 Rep. Pat. Cas. 603, 610.
(3) L. R. 6 Ch. 239.
(4) 12 Rep. Pat. Cas. 262.

bound by them. He is bound by them on this principle: the patentee has the sole right of using and selling the articles, and he may prevent anybody from dealing with them at all. Inasmuch as he has the right to prevent people from using them or dealing in them at all, he has the right to do the lesser thing, that is to say, to impose his own conditions. It does not matter how unreasonable or how absurd the conditions are. It does not matter what they are, if he says at the time when the purchaser proposes to buy or the person to take a licence: 'Mind, I only give you this licence on this condition,' and the purchaser is free to take it or leave it as he likes. If he takes it, he must be bound by the condition. It seems to be common sense, and not to depend upon any patent law or any other particular law." As to the attempt, however, to bind a purchaser to a condition not brought to his notice at the time of the sale, such an attempt cannot succeed. The purchaser "had bought it subject to no condition, and the bringing of a condition to his mind after the sale was completed will not do, and it ought not to do. It would be a most oppressive thing that any person who bought a box of this kind, and who happened to find out before he used the thing that it was covered with a label of this kind—it would be a most oppressive thing if he were bound to observe the conditions which are upon it." So far as this judgment is concerned, it will be seen that it only put with force and clearness what had been the result of authority in England for about at least a quarter of a century on the two main points, namely, first, the effect of sale without conditions, and, secondly, the limitation of the rights of an owner who buys a patented article with knowledge of the conditions. It may be said to have introduced a third element which was really a clearing up of the other two, namely, that the imposition or knowledge of restrictive conditions must occur at the time of sale, and that a purchaser who has made his bargain is not bound to conform to conditions which are attempted to be subsequently imposed upon him.

In 1901 occurred the case of *British Mutoscope and Biograph Co.* v. *Homer*. (1) The case had reference to the seizure of

(1) [1901] 1 Ch. 671.

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a patented chattel on the premises of a licensee under the operation of a distress for rent issued by the landlord. The distinction taken between a chose in action, which has no locality and is incapable of manual seizure, and a chose in possession found upon the demised premises need not be entered upon; but upon the rights of a patentee Farwell J. made these observations, entirely in accord with, by that time, the long line of authority: "A patentee is entitled to restrain any person in whose hands he finds an article which infringes his patent from infringing such patent unless the defendant can shew a title direct or derivative from the patentee to use the patent; and it has recently been held in *Incandescent Gas Light Co.* v. *Brogden* (1) that a purchaser who buys with knowledge of the conditions under which his vendor is authorized to use the patented invention, is bound by such conditions, and that such conditions are not contractual, but are incident to and a limitation of the grant of the licence to use, so that if the conditions are broken there is no grant at all."

There was then in 1904 the case of *McGruther* v. *Pitcher*. (2) This had reference to the case of ordinary, that is, unpatented, goods, which were held free, on a transaction of sale, from conditions restrictive of the power and price of resale. The judgment of the present Master of the Rolls (then Cozens-Hardy L.J.) is, in the opinion of their Lordships, of value, in this especial respect, that it clearly and expressly pointed the distinction between the sale of unpatented and of patented goods. His Lordship said: "I cannot help thinking that in the argument in the Court below some confusion was introduced by reference to patent rights. Now this action is neither in form nor in fact an action by a patentee claiming an injunction to restrain an infringement of his patent. In such an action it is open to the defendant to plead a licence by the plaintiff. That licence may be express, or it may be implied from the sale by the patentee of the patented article, but, if the defendant pleads a licence, then it is competent for the plaintiff to reply, 'The licence which I granted is a limited licence, and you, the person who has now got the patented article, were aware it was only a limited

(1) 16 Rep. Pat. Cas. 179. (2) [1904] 2 Ch. 306.

licence, and you cannot therefore defend yourself against my claim for an infringement of my patent, because you are going outside the licence which to your knowledge I gave with reference to this article.' Such a case would not depend upon any condition running with or attaching to the article. It would depend only upon the limits of the licence which the patentee had granted when he first parted with the goods."

In their Lordships' opinion, it is thus demonstrated by a clear course of authority, first, that it is open to a licensee, by virtue of his statutory monopoly, to make a sale sub modo, or accompanied by restrictive conditions which would not apply in the case of ordinary chattels; secondly, that the imposition of these conditions in the case of a sale is not presumed, but, on the contrary, a sale having occurred, the presumption is that the full right of ownership was meant to be vested in the purchaser; while thirdly, the owner's rights in a patented chattel will be limited if there is brought home to him the knowledge of conditions imposed, by the patentee or those representing the patentee, upon him at the time of sale. It will be observed that these propositions do not support the principles relied upon in their absolute sense by any of the judges of the Court below. On the one hand, the patented goods are not, simply because of their nature as chattels, sold free from restriction. Whether that restriction affects the purchaser is in most cases assumed in the negative from the fact of sale, but depends upon whether it entered the conditions upon which the owner acquired the goods. On the other hand, restrictive conditions do not, in the extreme sense put, run with the goods, because the goods are patented.

Applying these principles to the present case, the result is this: the respondent, Mr. Menck, has been acquitted of every charge of violation of contract which was laid against him by the appellants. He has also succeeded in shewing that the claim made by the appellants as patentees was in its nature extreme and unsound in law. But he made this mistake: he assumed that, being guiltless of violation of contract, he was as free as an ordinary member of the public who had acquired possession of articles embodying the appellants' patent. His misfortune, however, consists in this, that by the very fact that

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he entered into contractual relations with the appellants he has become seized with the knowledge of the conditions on which they dispose of their goods, and he is not free to propone the plea that such conditions have not been brought home to him. When he therefore announced his intention to deal in these articles as ordinary articles of commerce, he must be held to have pursued a mistaken course, the course of treating himself as an unrestricted instead of a restricted trader. In this particular case the result may involve some hardship to him, but their Lordships cannot see their way to a departure from the principle that a restriction rests upon a purchaser of goods which are covered by a grant of patent, and which have come into the possession of a purchaser in the full knowledge of the restrictions imposed by the patentee upon their disposal. Notwithstanding the most able presentment of his case by his counsel, Mr. Levinson, their Lordships are of opinion that in the one particular referred to it cannot be given effect to.

Their Lordships do not further examine the attitude and action of the appellants, but they are of opinion that the award of costs in favour of the respondent in the Court below should stand, and that having regard to the condition upon which special leave to appeal was granted the respondent is entitled to his costs as between solicitor and client in this appeal.

Their Lordships will humbly advise His Majesty that the judgment of the High Court of Australia be reversed, and that in lieu thereof an injunction in the limited sense before mentioned do issue against the respondent, namely, to restrain him, his servants or agents, from infringing the letters patent, and that quoad ultra the appellants' claims in the action be dismissed, with an order as above indicated as to costs.

Solicitor for appellants: *Richard O. Read.*
Solicitors for respondent: *Bartlett & Gluckstein.*

[PRIVY COUNCIL.]

SAMUEL JACOBUS GREYVENSTEYN . . PLAINTIFF;

AND

DANIEL WILHELMUS HATTINGH AND OTHERS . . . . . } DEFENDANTS.

J. C.* 1911 March 8, 9, 28.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Action for Damages—Swarm of Locusts—Landowner's Right of Self-protection.

In an action by the appellant, inter alia, for damage caused by the respondents, who were adjoining proprietors, in that they drove from without his boundary fence a swarm of locusts away from their own lands and in the direction of his cultivated lands:—

Held, that the respondents were entitled to drive the locusts away as a measure of self-protection and were not responsible for the consequences.

APPEAL from a judgment of the Supreme Court (April 30, 1909) affirming a judgment of Buchanan J. (May 14, 1908).

The action was brought for damages for trespass alleged to have been committed by the respondents on the appellant's farm on various days and dates in the months of November and December, 1907, and for wilful damage caused by them and through their acts on those occasions.

The appellant alleged, so far as now material, that the respondents drove the locusts in the direction of his cultivated lands from outside his boundary fence on November 30 and December 1 and 2, and that in consequence of the action of the respondents the natural course of the locusts was altered and the appellant was unable to prevent them, so driven, from entering his cultivated lands and destroying his crops of corn, forage, and potatoes.

The respondents denied that they on any occasion drove the locusts towards the appellant's cultivated lands, but alleged that they had on the contrary driven them away from those lands and in a direction parallel to the appellant's boundary fence.

Buchanan J. regarded the main ground of the plaintiff's claim as being a contention that the defendants were not entitled from

* *Present:* LORD MACNAGHTEN, LORD ROBSON, and SIR ARTHUR WILSON.

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outside the plaintiff's boundary to try to prevent the locusts from coming on their own ground, and this contention he regarded as untenable. He treated the matter as if the effect of the defendants' driving might have been to turn back some locusts on the plaintiff's land, but he held that there was no wilful or mischievous driving and the defendants were entitled to do what they did.

The Supreme Court affirmed this judgment, De Villiers C.J. concluding his judgment as follows: "In the present case the locusts were a common enemy to all the farmers of the neighbourhood, including the defendants. The wisest course would have been for them all to join in the expense of poisoning the insects on whatever farm they happened to be, but the plaintiff, whose farm the enemy first invaded, set the example of driving it away from his own property, with the result that it invaded his immediate neighbour's property, and became a menace to the defendants' property, which lay in the direction towards which the enemy was travelling. The defendants in their turn attacked the enemy while it was crossing, and after it had crossed the plaintiff's boundary, but the object of their attack was not to drive the locusts back, but to divert them in a line parallel to the plaintiff's boundary. The effect of this operation, which was being conducted by the defendants with the consent of the owner of the land on which they were, would be to keep the common enemy away from their land, and if the further result was that some of the enemy returned to the plaintiff's property, the defendants are not, in my opinion, answerable for the consequences."

Sir R. Finlay, K.C., and *E. Charles*, for the appellant, contended that on the evidence the respondents deliberately and wilfully drove the locusts towards his cultivated lands. But assuming the evidence fell short of establishing the wilful and malicious character of the respondents' action, it was contended that the Court below was wrong in law in holding that in the circumstances that action was lawful. They drove the locusts away in such manner and direction as certainly to damage the appellant's land. They did so in order to avoid risk of injury to

themselves which could only be regarded as contingent and perhaps probable, while the resulting damage to the appellant was certain and very serious. It was contended that under those circumstances the appellant had sustained an injury which entitled him to damages, and that the conduct of the respondents was caused by an unreasonable selfishness. Reference was made to *Smith* v. *Kenrick* (1); *Hurdman* v. *North Eastern Ry. Co.* (2); *Whalley* v. *Lancashire and Yorkshire Ry. Co.* (3); *Menzies* v. *Breadalbane.* (4)

Holman Gregory, K.C., and *E. Beaumont*, for the respondents, were not heard.

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The judgment of their Lordships was delivered by

LORD ROBSON. This is an appeal by the plaintiff in the action from a judgment of the Supreme Court of the Cape of Good Hope, which affirmed the decision of a Divisional Court (Buchanan J.) dismissing the action with costs.

The parties are all farmers in the district of Molteno, in the Cape of Good Hope.

On November 25, 1907, the appellant's farm was entered from the north by a swarm of locusts. They were "voetgangers," i.e., young insects who had not yet acquired the use of their wings, and who trekked across the country on foot, eating the grass and crops on their way. The farms of the respondents lay to the south of the farm thus invaded, and were separated from it only by a comparatively narrow strip of veldt belonging to various persons. The locusts trekked across the appellant's farm in a direction which made the respondents reasonably apprehensive for the safety of their own lands, and the steps they took to avert the anticipated danger have given rise to the complaint of the appellant. He alleged firstly that the respondents wrongfully and maliciously trespassed on his lands and drove the locusts back on to the cultivated portions thereof, so as greatly to increase his damage. On this point there was a sharp conflict of testimony. The respondents allege that they went on the appellant's farm at his request or with his approval

(1) (1849) 7 C. B. 515.
(2) (1878) 3 C. P. D. 168.
(3) (1884) 13 Q. B. D. 131, 136.
(4) (1828) 3 Bli. (N.S.) 414, 418, 419.

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in order to repel a common danger, and that if any trespass was, at any time, in fact committed, it was of a trivial character and without either the effect or the intention of doing the appellant any material harm. Buchanan J., who heard the evidence, has made clear findings of fact on this part of the case, and their Lordships see no reason why those findings should not be fully accepted. The learned judge did not believe that there was any wilful or malicious driving of the locusts on to the appellant's cultivated land, and he accepts the respondents' story as to how they came to enter his farm and what they did there. He further finds that the sum paid into Court by the respondents to meet any damage they may have caused by the alleged trespass, apart from the damage done by the locusts, was more than sufficient. There was ample evidence to support all these conclusions, and the appellant's case on this head fails.

But the alleged trespass was not the main issue in the case. When the respondents were forbidden to remain on the appellant's land, they, with the consent of the adjacent proprietors, took up positions on the veldt outside his boundary and drove the locusts back on to his farm and in various directions away from the direction in which their own farms lay. The result of this proceeding was, of course, detrimental to the appellant's land. It is contended on his behalf that such action on the part of the respondents was wrongful. His case is that locusts are like flood water, and that their natural course must not be diverted, even in self-defence, if injury is thereby caused to a neighbouring proprietor.

According to this argument the respondents were bound to receive the locusts. In support of this proposition the appellant's counsel cited a number of cases which, in the view of their Lordships, have little or no analogy to the present case.

In *Menzies* v. *Breadalbane* (1) the defendant was erecting an embankment which would have the effect of throwing the ordinary flood stream of the river Tay off his lands and entirely on the lands of his neighbour. The House of Lords held, on the facts of that case, that the embankment was an obstruction and diversion of the natural and ancient course of the stream in

(1) 3 Bli. (N.S.) 414.

times of flood and that the natural course of a river could not legally be altered by one proprietor so as to create a new waterway to the prejudice of other proprietors. The same principle was illustrated in another aspect by the decision in *Farquharson* v. *Farquharson*, an unreported case cited by the Lord Chancellor in *Menzies* v. *Breadalbane*. (1) In that case it was held that a riparian proprietor might erect a mound to prevent the river from encroaching on his land and creating a new waterway for itself.

Great reliance was placed by the appellant on the decision in the first-mentioned case, but the principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest, which it is the interest of every one concerned to repel or destroy. The supposed analogy between the two things is wholly fallacious. The pest has no settled course, and whatever its course may be, no one is bound to respect it. Indeed, the progress of a fire would be a much nearer analogy to the moving horde of locusts than the course of a river.

The case of *Smith* v. *Kenrick* (2) was also cited by the appellant. That was a case of adjacent mine-owners. The defendant's mine was on a higher level than that of the plaintiff and was subject to no servitude in favour of the latter. As the defendant's mining operations proceeded on his own property in the manner most convenient to himself, the plaintiff's mine was flooded by water from the workings of the defendant. This was held to be no wrong on the part of the defendant, for it took place in the ordinary and natural user of his property, but no one suggested that the plaintiff was not entitled to protect himself by barriers which would have dammed the stream of water back on the defendant's mine, where it had its origin. On the contrary, that was held to be his proper remedy, and such a remedy is fairly analogous to the conduct of the defendants in the present case.

The appellant, of course, admitted that an owner or occupier of land is entitled to defend or protect his property so far as he can, but he said they had no right to do so by transferring the mischief from their own land to that of their neighbour, and according

(1) 3 Bli. (N.S.) 414.

(2) 7 C. B. 515.

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to him that was what the respondents did when they prevented the locusts from leaving his land in order to keep them from coming on their own. In support of this proposition the case of *Whalley* v. *Lancashire and Yorkshire Ry. Co.* (1) was cited. In that case an abnormal rainfall caused water to accumulate in large quantities against the defendants' embankment, and they released it by making holes in the embankment so that the water flowed on to the land of the plaintiff and did much greater damage than if it had flowed there direct, without the temporary obstruction of the embankment. This was held to be wrong, but the decision does not help the appellant. It cannot be said that the obligation of a landowner not actively to transfer to his neighbours a danger which he himself has created or increased is inconsistent with the right of a landowner to repel some extraordinary misfortune which comes to him by way of his neighbour's land.

In *Whalley's Case* (1) Lindley L.J. points out that, if an extraordinary flood is seen to be coming, the owner may protect his land from it, and so turn it away without being responsible for the consequences. Visitations of locusts, though no doubt unpleasantly frequent, are in the nature of extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season.

On the facts as found in this case their Lordships are of opinion that the respondents did no more than what Lindley L.J. has defined as being within their rights. But their conduct may be justified on a wider and simpler ground. Even if the invasion be regarded as a normal incident of agricultural industry in South Africa, the respondents would be entitled, as an agricultural operation, to drive the locusts away. just as they are entitled to scare crows, without regard to the direction they may take in leaving.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Biddle, Thorne, Welsford & Sidgwick.*
Solicitors for respondents: *Wilde, Moore, Wigston & Co.*

(1) 13 Q. B. D. 131.

[PRIVY COUNCIL.]

GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } DEFENDANTS;

AND

WALTER C. BARNETT . . . . . PLAINTIFF.

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March 9, 10, 28.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Action for Negligence resulting in a Collision—Plaintiff a Trespasser and not a Passenger—No Breach of Duty or Cause of Action.

In an action against the appellant railroad company for damages for personal injuries resulting from collision caused by the negligence of the appellants' servants it appeared that the collision took place on the property of the appellants to which the train carrying the plaintiff, which belonged to another company, had access by their leave and licence. It further appeared that the plaintiff was a trespasser on the appellants' property and also on the said train, which to his knowledge was not at the time in use as a passenger train and in which he had taken up a precarious position on the platform and step of a carriage in disobedience of a by-law of both companies:—

Held, that the appellants were not liable, for no breach of duty had been shewn.

APPEAL from a judgment of the Court of Appeal (October 13, 1910) affirming a judgment of a Divisional Court of the High Court of Justice (March 7, 1910).

The plaintiff respondent alleged that on August 23, 1909, in the night time, he was a passenger on a train owned and operated by the Pere Marquette Railway, and that when the said train was moving reversely in a south-easterly direction on the main track in the city of London it collided with the defendants' van or car owing to the negligence of the defendants and their servants, whereby the plaintiff lost both of his legs and sustained other injuries. The negligence imputed was in leaving the said van or car on a siding foul of the main line when the switch was set for the main line; and in not having lights on the van or car to warn the servants on the Pere Marquette Railway train that the van or car was foul of the main line.

* *Present:* LORD MACNAGHTEN, LORD ROBSON, and SIR ARTHUR WILSON.

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Upon the findings of the jury that the plaintiff was not on the train by the permission of the Pere Marquette Railway Company, and was not upon the platform of their car at the time of the accident by their permission, that is, the permission of those who were in charge of that train, the trial judge gave judgment in favour of the appellant company and dismissed the action without costs.

The Divisional Court in appeal found that the plaintiff was on the platform of the Pere Marquette car with the knowledge of Cole, the brakesman, and that the appellants were therefore liable, and that even if the plaintiff was a trespasser on the Pere Marquette car the appellants would still be liable for the injuries sustained.

In the Court of Appeal Moss C.J. held that, no matter what the plaintiff's true position was as far as the Pere Marquette Railway Company was concerned, he was not at the time a trespasser upon the rights of the appellants, and that, the collision having happened through the negligent act of their servant, they were responsible for any injury resulting therefrom. "There was nothing to absolve the defendants from the duty of exercising due care to avoid collision with the Pere Marquette train."

Garrow J. held that, as the Pere Marquette train was rightly on the appellants' tracks, the respondent was not a trespasser so far as the appellants were concerned.

Meredith J. held that the appellants owed no duty to the respondent, who had no right to be at the place where he was injured, and whose presence there was unknown to the appellants or to the employees of the Pere Marquette Railway Company.

D. L. McCarthy, K.C., and *S. F. Spence*, for the appellants, contended that the view taken by the trial judge and by Meredith J. in the Court of Appeal was right. The respondent was a trespasser. Even if he had a right to be on the train he had no right to stand on the platform of the car, much less on the steps of the platform, which position was the proximate cause of his injuries. There was no suggestion of any wilful act on the part of the appellants' servants having caused the collision; and the jury found that the men in charge of the Pere

Marquette train did not know he was there, and if they had known would have put him off before the train started. The appellants owed him no duty except for a wilful or wrongful act, for he was as much a trespasser on their line as if he had been walking on the tracks. To stand where he did was to court disaster in case of a collision and was plainly contributory negligence. Sect. 282 of the Railway Act (R. S. C., 1906, c. 37) protected the appellants, who had posted up the notices required by that section at their stations forbidding persons to ride, as the respondent had done, on the platform or steps of trains. Reference was also made to s. 425 (*c*) of that Act, and to *Watson* v. *Northern Ry. Co. of Canada* (1); *Lowery* v. *Walker* (2), which was reversed on appeal (3) on the ground that the plaintiff was where he was with the permission of the defendant, though without express leave; *Degg* v. *Midland Ry. Co.* (4)

Foulds and *P. H. Bartlett*, for the respondent, contended that the accident was due to the gross negligence of the appellants, and that the Pere Marquette train was lawfully upon the track over which it was being operated. Further, the collision occurred upon a public highway in the city of London, and the appellants in the circumstances were wrongfully thereon. There was no evidence that the respondent was a trespasser on the appellants' property. He was on the property of the Pere Marquette Railway Company, whose train at the time of collision was rightfully where it was. The appellants had only a right of way over the highway and could not rely upon proprietary right which was by Ontario law vested in the Crown. They referred to *Leame* v. *Bray*. (5) With regard to s. 282 of the Railway Act and the notices relied upon by the appellants, the latter were improperly received in evidence notwithstanding the respondent's objection. The respondent claimed that he was on the Pere Marquette car with the consent of the Pere Marquette Company, and the notices had no application to that question and improperly influenced the jury. Sect. 282 only applied to passengers riding on the train of those who sought protection thereunder. The appellants

(1) (1864) 24 U. C. Q. B. 98.
(2) [1910] 1 K. B. 173.
(3) [1911] A. C. 10.
(4) (1857) 26 L. J. (Ex.) 171.
(5) (1803) 3 East, 593.

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could not invoke it against a passenger by the train of some other company. The respondent was not violating any valid regulations of the Pere Marquette Company—see ss. 307, 310, 312 of the said Railway Act—for they had not been, as directed by those sections, approved by the Governor in Council, but only by the Board of Railway Commissioners. The appellants were liable, for the proximate cause of the respondent's injuries was their gross active negligence, and in the circumstances the respondent was not guilty of contributory negligence. Reference was made to Shearman and Redwood on the Law of Negligence, 5th ed., vol. 1, p. 98; *Philadelphia and Reading Railroad Co.* v. *Derby* (1); *Grand Trunk Railroad Co.* v. *Richardson* (2); *Wilton* v. *Middlesex Railroad Co.* (3), where it was held that a person riding with due care on the platform of a horse car of a street railroad corporation, not as a passenger for hire but by invitation of the driver, was entitled to damages against the corporation when injured through the driver's negligent driving; *Railroad Co.* v. *Stout* (4); *Gallagher* v. *Humphery* (5); *Nightingale* v. *Union Colliery Co.* (6) As to the accident taking place on the highway, see *Grand Trunk Railroad Co.* v. *McKay.* (7) See also *Harrison* v. *Duke of Rutland* (8); *Barnes* v. *Ward* (9); *Rigby* v. *Hewitt.* (10)

McCarthy, K.C., in reply.

1911 *March* 28.

The judgment of their Lordships was delivered by

LORD ROBSON. This is an appeal from a judgment of the Court of Appeal for Ontario (Meredith J.A. dissenting) affirming the judgment of a Divisional Court of the High Court of Justice, which reversed the judgment of Meredith C.J., delivered in favour of the appellants on the findings of the jury.

The respondent was plaintiff in the action, and sued for damages for personal injuries caused by the negligence of the defendant railway company's servants.

(1) (1852) 55 U. S. 468.
(2) (1875) 91 U. S. 454, 471.
(3) (1871) 107 Massachusetts, 108.
(4) (1873) 17 U. S. 656, 661.
(5) (1862) 10 W. R. 664.
(6) (1904) 35 S. C. R. 65, 67.
(7) (1903) 34 S. C. R. 81, 87.
(8) [1893] 1 Q. B. 142.
(9) (1850) 9 C. B. 392.
(10) (1850) 5 Ex. 244.

The Grand Trunk Railway Company and the Pere Marquette Railway Company have each a station and railway yards a short distance from each other in the city of London, Canada. The Grand Trunk Railway, under some arrangement with the Pere Marquette Railway, which was not given in evidence, allow the latter company's trains, or some of them, access to the Grand Trunk Company's station by means of a cross line called a "lead." This line begins on the Pere Marquette Company's property, and, entering the railway yard of the Grand Trunk Company, crosses its lines so as to bring the Pere Marquette train up to the Grand Trunk station. The particular train concerned in the accident was the Pere Marquette train which arrived at the Pere Marquette station at about 9.25 on the night of August 23, 1909. It was signalled from the Grand Trunk Company's yard to come along the "lead," which it did, and duly discharged its passengers at the platform of the Grand Trunk station. Its ordinary and proper course then was to wait until it received a signal from the Grank Trunk switch operator, after which it backed out over the Grand Trunk tracks and returned to the Pere Marquette yard, where it remained for the night. The respondent Barnett was aware of this practice. On the night in question he came into the Grand Trunk station, and, going to the Pere Marquette train before it began to back out, he jumped on the platform at the rear end of a car, and stood with one foot on the platform and one foot on the step, his object being to get a lift as far as the Pere Marquette station, which was on his way home. He was aware that the train was not at that moment in use as a passenger train, and he of course had no ticket and does not pretend that he received any invitation or had any right to do what he did. He must also have been aware that in thus standing on the platform, and particularly in a position so precarious as having one foot on the platform step, he was disobeying a by-law of the Grand Trunk Railway Company. His knowledge on that point, however, is immaterial, for the by-law has the force of a statute. His counsel contended that it bound only the passengers of the Grand Trunk Railway Company, but it is applicable to any person taking any train on their premises. A similar prohibition existed on the

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Pere Marquette Railway, and is even said to have been affixed to the door of the car by which the respondent was travelling on this occasion. His breach of duty in thus standing on the car platform seems, in the events that happened, to justify a charge of contributory negligence against him, but the view their Lordships take of the rest of the case makes it unnecessary to decide this point.

The train backed as usual along the "lead," and while still on the property of the Grand Trunk Company, a freight train of that company, which was being made up at an adjacent siding, was negligently backed so as to come into collision with the train on which the respondent was standing. He was thereby thrown off the car platform and seriously injured.

In their Lordships' opinion, the respondent was a trespasser both on the premises of the Grand Trunk Company and on the train of the Pere Marquette Company.

At the trial the respondent contended that he, in common with other persons and with the knowledge of the Pere Marquette officials, had frequently made use of this train when backing from the Grand Trunk station to the Pere Marquette Company's yards and had not been turned off the train or called upon to pay a fare. He gave evidence on this point which, if it had been believed by the jury, would have sufficed to shew that on the occasion in question he was there with the knowledge, at all events, of the brakesman of the train. The brakesman and the other Pere Marquette servants in charge of the train were called and stated that they did not allow passengers to use it on the way back to the Pere Marquette yards, and did not acquiesce in such user. Their evidence was that if they saw such persons in time they put them off, but they could not stop the train to put them off, and still less could they put them off while the train was moving, so that no doubt a certain number of persons on some occasions managed to use the train in this irregular way. The evidence on both sides as to this user of the empty train by persons without tickets, and the alleged acquiescence therein on the part of the Pere Marquette Railway officials, was fully and carefully put before the jury by the learned trial judge, and he directed them that if in their opinion

there was a general practice of persons going, as the plaintiff had gone, on the platform of this train with the knowledge not merely of one set of officials or railway servants connected with the train, but of different officials and on different occasions, then that was evidence upon which they might come to the conclusion that it was a practice sanctioned by the company itself.

The following are the questions submitted to the jury by his Lordship so far as they are now material :—

(1.) Was the plaintiff, at the time of the accident, upon the train of the Pere Marquette Railway Company by the permission of the company ?

Answer.—No.

(2.) Was the plaintiff upon the platform by the permission of the Pere Marquette Railway Company ?

Answer.—No.

Before putting these questions his Lordship invited counsel for the plaintiff to suggest any other question which they thought should be put to the jury, but the only suggestion in answer to that invitation was that the jury should be asked to say whether or not the negligence was gross, and in view of the admissions of the parties the learned judge very properly declined to put that question. It was further agreed by the parties that if there was any point necessary for the determination of the rights of the parties not covered by the questions submitted, that point should be determined by the Courts.

The counsel for the respondent now complain that the jury were not asked whether the respondent was on the car on the occasion in question with the knowledge and acquiescence of the brakesman of the train. It was not suggested that the brakesman had authority to give permission, and, so far as standing on the car platform was concerned, the respondent must have known from the prohibitory notice on the car door that the brakesman had no authority to allow that. The brakesman, however, swore that he did not know the respondent was there, and, even had he known it, the circumstance would only have been material as evidence of the general

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practice alleged by the respondent. In the absence of any such practice, a specific finding that the brakesman had, on this occasion, allowed the respondent to get on the train without a ticket, and then to stand on the platform of the car, could not have given the respondent a cause of action. The learned judge adopted the course of directing the jury as to the facts necessary to establish a cause of action and then putting a question which covered those facts. He was neither invited nor bound to put further questions on any particular fact.

There was a further question raised on appeal, though not in dispute at the trial, as to whether the collision took place on the property of the Grand Trunk Railway Company or on that of the Pere Marquette Railway Company. The respondent's counsel now contend that it took place on the property of the latter company, so that their client could not be said to be a trespasser on the property of the appellants. The evidence is quite clear that at the trial the collision was treated by everybody as having taken place on the ground or in the yards of the Grand Trunk Company. The junction between the two properties was stated by the respondent himself as being in or near Colborne Street, and that is some distance further along in the direction in which the train was backing, and beyond the point at which the collision took place. The respondent himself said the train "travels along the Grand Trunk track to Colborne Street, and then they throw a switch for it to get on to the Pere Marquette," and the other witnesses refer to the Pere Marquette yard as beginning at Colborne Street.

The Court of Appeal said that, as the Pere Marquette Railway Company was entitled, under its arrangement with the Grand Trunk Company, to use the "lead" as a means of access to the Grand Trunk station and back again to the company's yard, it would, while actually using that "lead," be necessarily in "exclusive possession" thereof even as against the Grand Trunk Railway Company. From this it is inferred that the respondent was no trespasser quoad the latter company. There is no evidence that the Pere Marquette Railway Company have any right of property in the "lead." So far as can be judged from the facts before the Court, the Pere Marquette Company would

seem only to have a right of way for themselves and persons lawfully claiming under them, but, subject to that right, the property remains in the Grand Trunk Company. Under those circumstances the respondent was not the less a trespasser on their property because he was there in the car of another company who might possibly have been able to give him leave or licence to be there but had not in fact done so. The notion that the Pere Marquette Company while using its right of way was in "exclusive possession" of the way, and therefore was alone entitled at that time to maintain an action for trespass, does not seem to distinguish adequately between the rights of a tenant and those of a licensee.

The case must therefore be taken on the footing that the respondent was a trespasser, and the question is, what under those circumstances are his rights against the appellant company? In order to make good a case of actionable negligence against them he must shew some breach of a duty on their part towards himself. The Divisional Court have held that "the personal safety of a human being (though he be a trespasser) must not be endangered by the negligent act of another. Given the circumstances of this case, it does not seem . . . . that the defendants are exempt from liability though the plaintiff was nothing else than a mere trespasser." The Court of Appeal was not prepared to agree with this general statement of the law, but rested its judgment on the ground above mentioned, namely, that the Grand Trunk Railway Company had parted with its right of possession, and therefore could not have maintained an action of trespass against the respondent. The railway company was undoubtedly under a duty to the plaintiff not wilfully to injure him; they were not entitled, unnecessarily and knowingly, to increase the normal risk by deliberately placing unexpected dangers in his way, but to say that they were liable to a trespasser for the negligence of their servants is to place them under a duty to him of the same character as that which they undertake to those whom they carry for reward. The authorities do not justify the imposition of any such obligation in such circumstances. A carrier cannot protect himself against the consequences which may follow on the breach of such an

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obligation (as, for instance, by a charge to cover insurance against the risk), for there can be no contracts with trespassers ; nor can he prevent the supposed obligation from arising by keeping the trespasser off his premises, for a trespasser seeks no leave and gives no notice.

The general rule, therefore, is that a man trespasses at his own risk. This is shewn by a long line of authorities, of which *Great Northern Ry. Co.* v. *Harrison* (1), *Lygo* v. *Newbold* (2), and *Murley* v. *Grove* (3) are familiar examples.

There is sometimes difficulty, however, in deciding when a man is really a trespasser. That is a question of fact, and in the present case it has been decided against the plaintiff by a jury properly directed.

Again, even if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care. An instance of this occurred where an owner placed a horse he knew to be savage in a field which he knew to be used by persons as a short cut on their way to a railway station : *Lowery* v. *Walker.* (4) In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care.

When these qualifications are borne in mind, the cases pressed by the respondent on the Courts below present little difficulty. Thus, in *Harris* v. *Perry* (5) the plaintiff was on the train in response to an invitation by a superintendent, who represented the defendant, and under those circumstances a previous verbal prohibition by the defendant was held not sufficient to justify the plaintiff in being treated as a trespasser.

In *Lowery* v. *Walker* (6) the Court of Appeal (Vaughan Williams and Kennedy L.JJ.) held that the plaintiff, being a trespasser, could not recover, and though their judgment was reversed in the House of Lords, it was only on the ground that on a proper construction of the findings of the county court

(1) (1854) 10 Ex. 376.
(2) (1854) 9 Ex. 302.
(3) (1882) 46 J. P. 360.
(4) [1910] 1 K. B. 173; [1911] A. C. 10.
(5) [1903] 2 K. B. 219.
(6) [1910] 1 K. B. 173.

judge the plaintiff ought not to be treated as a trespasser. Otherwise, as Lord Halsbury says (1), "the word 'trespasser' would have carried the learned counsel for the defendant all the way he wants to get."

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed and that the judgments of the Court of Appeal for Ontario and of the Divisional Court ought to be reversed and the judgment of the trial judge restored. At the trial the appellants do not appear to have asked for costs, but they have been ordered to pay the costs of the two appeals in the Courts below. These costs must be repaid to them by the respondent, and they will also have their costs of this appeal.

Solicitors for appellants: *Batten, Proffit & Scott.*
Solicitors for respondent: *Poole & Robinson.*

[PRIVY COUNCIL.]

MUNICIPAL COUNCIL OF SYDNEY . . . PLAINTIFFS;

AND

FREDERICA SARAH FLEAY AND OTHERS . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Moore Street Improvement Act, 1890, *ss.* 4 *and* 6—*Construction—Effect of Assessment on Owners within the Improvement Area—Liability of Owner for Time being.*

The New South Wales Moore Street Improvement Act, 1890, authorized the appellants to make street improvements, the cost thereof (see ss. 4 and 6) to be divided between the whole body of ratepayers under a special street improvement rate and the owners of property within the improvement area.

In a suit by the appellants to enforce liability for the unpaid amounts assessed in respect of three properties within the improvement area the

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* *Present:* LORD MACNAGHTEN, LORD ROBSON, and SIR ARTHUR WILSON.

(1) [1911] A. C. 10.

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judge ordered its dismissal on the ground that with regard to two of the houses they ought to have been separately assessed, and in regard to the third that the defendants were not the successors in title of the person originally assessed :—

Held, that the appellants were not required to assess each house separately, but only the properties of owners, and that, the improvement having been duly commenced and the assessment on owners duly completed according to the requirements of ss. 4 and 6, the owner for the time being was liable for the amount assessed upon his property and for arrears not exceeding three years before suit.

APPEAL from a decree of the Supreme Court (November 24, 1909) dismissing the appellants' suit, which was brought to establish the liability of certain properties known as Nos. 20, 22, and 30, Castlereagh Street, Sydney, and of the respondents as their respective owners in respect of the contributions that had been assessed against such properties to the cost of certain street improvements under the Moore Street Improvement Act of 1890 (N. S. W. Act 54 Vict. No. 30). The assessment took place in the middle of the year 1891.

The question raised by the appeal was whether the said assessment was vitiated by certain alleged errors in the assessment book prepared under the Act and not appealed from in manner as provided by the Act.

The appellants, before they commenced the works authorized by the Improvement Act of 1890, duly complied with all the provisions of s. 4 thereof. The notification required by that section was on June 19, 1891, first published in the *Gazette* and in two of the daily newspapers published in Sydney, the prescribed plan and list of owners (so far as the same could be ascertained) having been previously deposited at the town hall. Annexed to the published notification was a schedule of the properties embraced in the improvement or betterment area. On July 28, 1891, the assessment book required by s. 6 of the Act was made and deposited at the town hall, and the notice mentioned in such section was in due course published as thereby directed.

The Supreme Court (Street J.) held that the appellants were not entitled to recover contributions in respect of No. 20 or No. 22, Castlereagh Street, inasmuch as no separate assessment had been made of each property, and therefore the amount of

the contribution payable by the owner of each property had not been ascertained. In dealing with this point the judge said: "Sect. 6 requires that the assessment book shall specify the amount which every owner of property situate within the improvement area will be required to pay in respect of his property. Obviously the intention of the Legislature in requiring this was to protect the owner of property and to ensure a fair assessment, and I think that it is a condition precedent to the right of the council to recover contributions from any owner that his property should have been separately assessed in order that he might know what his liability was and might have appealed against the assessment if he thought it unfair."

As regards No. 30, Castlereagh Street (No. 5, 5A), the judge observed: "As I have already pointed out the council notwithstanding that its mistake was pointed out to it in ample time to permit of a correction before the assessment book was prepared deliberately persisted in its error and deliberately assessed Mr. Backhouse as the owner. What course Mr. Fleay would have taken if he had been assessed as owner, I cannot say, and it is immaterial to consider. The council, as I say, deliberately persisted in treating Mr. Backhouse as the owner and in assessing him as such, and I do not think that in these circumstances it can now turn round and sue the successors in title of an owner who was never assessed, and who was therefore never concerned to test the fairness of an assessment, in fact, made on some one else. . . . . In the view which I take of the matter it is unnecessary to consider the claim of the council to a statutory remedy in respect of unpaid contributions against the property itself. I am, however, clearly of opinion that the Act does not confer any remedy against the land itself, but only imposes a personal obligation upon the owner for the time being."

Sir R. Finlay, K.C., and *Austen-Cartmell*, for the appellants, contended that the assessments made on all three houses were binding upon and enforceable against the true owners thereof for the time being. If there had been any error at the time of assessment and the names of the owners of these properties had not been correctly entered in the assessment book it was a matter

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in respect of which an appeal might have been brought under the Act of 1890, s. 7. The error, if any, did not vitiate the assessment. "Owner" is not defined in the Moore Street Improvement Acts of 1890 and 1892, but in s. 3 of the Sydney Corporation Acts of 1879 and 1902 it is defined as "the landlord or person at the time receiving the rent for any premises whether on his own account or otherwise or who shall claim to be the owner." On the evidence Mrs. Fleay was the true owner at all material times till her death on November 16, 1906, and from that date the first four respondents have been the owners. Under the circumstances it was unnecessary to separately assess Nos. 20 and 22, and there was no appeal from their assessment as one property, and accordingly the irregularity, if any, was cured. The Act was substantially complied with before the improvement was begun, and after the assessments had been duly made and the statutory liability of owners duly ascertained anything done or omitted by the appellants could not have the effect of relieving them of that liability at the expense of the general body of ratepayers.

Macmorran, K.C., and *A. A. Bethune*, for the respondents, contended that the assessments in question were void and could not be enforced. The requirements of the Act of 1890 had not been complied with. The plan did not shew how much of the land assessed was included in the improvement area. The notices did not shew the names of the true owners although the properties in question had been registered under the Real Property Act, 26 Vict. No. 9. The Act required the assessment book to be the work of the appellants, and it was neither made nor approved by them. Nos. 20 and 22 were shewn to belong to different owners, and therefore each of them ought to have been separately assessed. No. 5 and 5A had been assessed in reference to a person who to the knowledge of the appellants was not the owner but a tenant, and the assessment could not be enforced against the respondents, who did not derive title from the only person who had been assessed or had had an opportunity of disputing the assessment. In any event the appellants could not claim arrears for more than three years: see Sydney Corporation Act of 1879 (43 Vict. No. 3), s. 238, and s. 211 of the later

Act No. 35 of 1902; and the conduct of the appellants disentitled them to the costs of this litigation.

Counsel for the appellants were not heard in reply.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The question involved in this appeal is of some consequence to the Municipal Council of Sydney and to the ratepayers of that city. It is of no general importance whatever. It turns simply on the construction of a local Act of Parliament—the Moore Street Improvement Act, 1890—which has already come under the consideration of this Board.

The Municipal Council of Sydney was constituted by the Sydney Corporation Act of 1879. That Act, among other things, authorized the council to make street improvements. But its provisions were cumbrous and of little or no practical use. So when improvements in Moore Street were in contemplation, the Act of 1890 was obtained in order to enable the council to carry them out on a better system.

The cost of the proposed work was to be divided between the whole body of ratepayers (upon whom a rate was to be levied, called the special street improvement rate) and the ratepaying owners of property within the improvement area.

Before commencing the work the council was directed to publish in the *Gazette* and in two daily newspapers in Sydney during four successive weeks a notification setting forth the nature of the improvement, and stating that a plan shewing the extent and position of the improvement area within which the owners of property liable to the city rate would be contributors to the special street improvement rate, together with a list of the names of such owners so far as the same could be ascertained, had been deposited with the town clerk for inspection by any person interested. This notification was to furnish a detailed estimate of the cost of the improvement, the amounts and dates of the repayments necessary to defray the whole cost thereof, with interest not exceeding 4 per cent. per annum. It was also to specify the period, which was not to exceed a hundred years and not to be less than fifty years in any case, over which such repayments would be spread, and the respective proportions

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(subject to an appeal as in the Act provided) in which the whole cost of the improvement was to be divided between the owners of property within the improvement area and the special street improvement rate.

Sect. 6 provided that within thirty days of the aforesaid notification the council should cause to be made and deposited with the town clerk an assessment book, in which should be specified the amount which every owner of property within the improvement area would be required to pay in respect of his property as his share of the aggregate amount of the contributions of all such owners. In determining such share regard was to be had to the position of every such property and the degree of permanent enhancement in its capital or annual value which the improvement might reasonably be expected to produce. During three successive weeks the council was to publish in the *Gazette* and in two daily newspapers in Sydney a notice that the assessment book had been so deposited and was open to the inspection without fee of all persons interested therein. And then within thirty days after the last publication of that notice any owner of property assessed in such assessment book, or his attorney or agent, was to be at liberty to give notice in writing to the town clerk of his intention to appeal to the Supreme Court against (1.) the inclusion of his property in the improvement area, or (2.) the proportion of chargeability as between the street improvement rate and the body of special contributors, or (3.) the amount of his assessment.

It will be observed that s. 6 does not require the council to enter in the assessment book the names of the several owners of the properties specially assessed, or to give any notice to such owners other than the notification in the *Gazette* and two newspapers published in Sydney. Sect. 4 does require the council to enter the names of the owners "so far as the same can be ascertained," but it does not require any notice to be served upon owners individually.

The council proceeded to carry out the Moore Street improvement scheme. The property to which this suit relates was included in the improvement area. It consisted of two lots shewn on the deposited plan. One was marked 5, 5A; the other 8.

The lot marked 5, 5A, was No. 30, Castlereagh Street. The owner was a Mr. Augustus Timewell Fleay. It was let to Benjamin Backhouse and Samuel Lyons. In the city rate-book Benjamin Backhouse appeared as owner.

The lot marked 8 consisted of two houses, Nos. 20 and 22, Castlereagh Street. In the city rate-book Mr. Fleay was entered as owner of both houses. Mrs. Fleay, his wife, was interested in both. They were held under different titles upon trust for Mrs. Fleay for life. Mrs. Fleay survived her husband. On her death, which happened on November 16, 1906, her only children, who are the first four respondents, became entitled to both houses as tenants in common in fee. They also obtained letters of administration with the will annexed to the estate of their mother.

No. 30, Castlereagh Street was transferred by Mr. Fleay to his wife in fee simple. It was not disposed of by her will, and on her death it passed to the first four respondents, her sole next of kin, as tenants in common in fee.

Mr. Backhouse wrote to the town clerk in June, and again in July, 1891, stating that he was only a leaseholder and not the owner of No. 30, Castlereagh Street, which belonged to Mr. Fleay. But he paid the annual amounts payable under the assessment until the surrender of his lease on January 1, 1901.

Mr. Fleay also wrote to the town clerk stating that he was not the owner of the property, Nos. 20 and 22, Castlereagh Street, and on August 15, 1891, he gave notice to the town clerk of his intention to appeal against the assessment on behalf of himself and also on behalf of the two sets of trustees in whom the two houses were respectively vested, on the ground that he was not the freeholder, and that the two houses ought to have been assessed separately. This appeal, however, was not prosecuted.

The council took no notice of the information given them by Mr. Backhouse and Mr. Fleay. And for some reason which is not explained they did not at any time collect, or attempt to collect, the assessment due in respect of Nos. 20 and 22, Castlereagh Street. Nor did they collect the assessment due in respect of No. 30, Castlereagh Street after the surrender of Backhouse's lease.

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In 1907 the municipal council brought this suit against Mr. Fleay's four children, claiming a charge on Nos. 20 and 22, Castlereagh Street, and on No. 30, Castlereagh Street, respectively, for the arrears accrued and unpaid in respect of the amounts assessed upon those properties, and also a declaration that the respondents and the estate of Mrs. Fleay were liable for the amounts of the assessments which had accrued due during the respective periods during which Mrs. Fleay and her children were in possession of the respective properties. They also asked for a reference to ascertain the amounts due, and, if necessary, for the administration of Mrs. Fleay's estate.

The suit came on to be heard in the Supreme Court before Street J. on November 24, 1909. The learned judge dismissed the suit, with costs. He held that the appellants were not entitled to recover contributions in respect of No. 20 or No. 22, Castlereagh Street, on the ground that a separate assessment ought to have been made in respect of each of the two houses. He dismissed the claim in respect to No. 30, Castlereagh Street, on the ground that as the council deliberately persisted in treating Mr. Backhouse as the owner, and in assessing him as such, they could not turn round and sue the successors in title of an owner who was never assessed.

Their Lordships are unable to adopt the conclusion at which the learned judge arrived, or to follow the reasoning of the judgment under review.

It cannot be contended that the municipal council failed to comply with the requirements of either s. 4 or s. 6. They took the list of owners of property within the improvement area from the city rate-book. There, as already stated, Backhouse was entered as owner of No. 30, Castlereagh Street, and Mr. Fleay as owner of Nos. 20 and 22, Castlereagh Street, which are adjoining houses, and apparently similar in every respect. Mr. Gorden, the officer specially appointed to carry out the Moore Street improvement, states that before making up the list of owners he visited each property and saw each owner or agent, and obtained whatever information he thought was necessary. Mr. Fleay, he says, returned himself as owner of No. 8, that is, Nos. 20 and 22, Castlereagh Street. It is difficult to see

what more the council could have done to comply with the requirements of the Act before commencing to carry out the improvement.

It cannot be suggested that anybody was misled or prejudiced by anything done or omitted to be done by the council before the improvement was commenced. There was no breach of any condition precedent. The council were not required to assess each house separately. They were to assess properties, not houses. They may have been culpably negligent or even perverse in omitting to correct inaccuracies in the list of owners when their attention was called to them. But, after all, the ratepayers are the persons who have suffered, not the owner of No. 30 or the owners of Nos. 20 and 22, Castlereagh Street. Mr. Fleay was the owner of No. 30; he had his office there, or somewhere within the improvement area. He must have known all about the assessment of his own property. It is plain from the notice which he gave of intention to appeal that everybody interested in Nos. 20 and 22 knew all about the assessment of that property. The council had nothing to do with the constitution of the Court of Appeal, as the learned judge seems to think. Nor had they any concern with an appeal so long as it was non-effective. It is difficult to see how the conduct of the municipal council, after the improvement was duly commenced and the assessment on owners of property within the improvement area duly completed, can have the effect of discharging any owner for the time being at the expense of his fellow ratepayers from a statutory liability attaching in respect of his property.

There is no difficulty about recovering arrears in the present case, as the first four respondents admit assets and are ready to pay whatever may be properly found due. But their Lordships are not prepared, as at present advised, to assent to the view expressed by the learned judge in the Court below, to the effect that under no circumstances can arrears be recovered from the property assessed.

There might have been a question of some difficulty as to the period during which arrears are recoverable. But the learned counsel for the appellants at the Bar very properly limited the claim to the period of three years before the institution of the suit.

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As regards costs, the whole trouble seems to have been caused by the omission of the municipal council to collect the assessments due from the owners of the properties assessed. Their long-continued inaction is unexplained and apparently inexplicable. Moreover, they seem to have brought this suit without any previous communication with the present owners or any attempt to arrive at a settlement without litigation. In these circumstances it appears to their Lordships that there ought to be no costs of these proceedings either here or below.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, the order appealed from discharged without costs, any costs paid under that order being repaid, and an order made for payment of the amount due, limited to three years' arrears before the institution of the suit. The amount if agreed may be inserted in the order.

There will be no costs of the appeal.

If the parties so desire, the order may provide for the division of the assessment on No. 8 in the deposited plan between the two houses comprised in that property.

Solicitors for appellants: *Light & Fulton.*
Solicitors for respondents: *Burton, Yeates & Hart.*

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JAMES LESLIE WILLIAMS . . . . . DEFENDANT;

AND

HAINES THOMAS GIDDY . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Public Service Superannuation Act, 1903, *s.* 4—*Gratuity for Public Service on Retirement—Discretion of Government as to the Amount—Exercise of Discretion must be reasonable, fair, and just.*

Under s. 4 of the New South Wales Public Service Superannuation Act, 1903, the plaintiff was awarded by the Public Service Board a gratuity of 23*l.* 10*s.* 1*d.* per mensem, calculated for each year of service from December 9, 1875, the date of his permanent employment, up to December 23, 1895; and upon his claiming to have his service reckoned up to August 16, 1902, was awarded a further gratuity of one penny in respect of each year subsequent to December 23, 1895, up to August 16, 1902, the date of the commencement of the Public Service Act of that year.

In an action to recover payment at the rate of 23*l.* 10*s.* 1*d.* for each year of the subsequent service:—

Held, that the award of one penny as above was illusory and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament, and that judgment should be entered for the plaintiff for the amount claimed.

APPEAL by special leave from an order of the Supreme Court (October 26, 1909) in an action against the appellant as nominal defendant appointed on behalf of the State of New South Wales under the Claims against the Government and Crown Suits Act, 1897. The respondent claimed therein 139*l.* 19*s.* 2*d.*, being the balance of the gratuity payable to him upon his retirement from the Government service; and the order directed that judgment should be entered for the amount claimed.

The appellant contended that under the circumstances stated in their Lordships' judgment (1.) the gratuity was only payable for service prior to December 23, 1895; (2.) that if payable

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subsequent to that date the Government was in the exercise of its discretion entitled to fix such gratuity at the maximum rate allowed by statute up to the said date, and at a nominal sum in respect of service subsequent thereto.

The judges of the Supreme Court agreed in the view that upon the true construction of s. 4 of the Public Service Superannuation Act No. 8 of 1903 the Government was entitled in the exercise of its discretion to fix the gratuity to be paid to an employee in the Government service upon his retirement therefrom at a sum less than the maximum amount prescribed thereby. The majority thought that the gratuity must be for the whole period of the employee's permanent service up to August 16, 1902, and that the Government was merely entitled in the exercise of its discretion to fix the amount which is to be allowed for each year of such service. They held that by granting the respondent a gratuity of one month's pay for each year of his permanent service up to December 23, 1895, it had exercised its discretion as to the basis on which the gratuity should be assessed, and was accordingly not entitled to depart from what it had deliberately done and allow the respondent sevenpence only as a gratuity for his subsequent service. Pring J., on the other hand, held that the Government had, notwithstanding the payment by it to the respondent of the maximum gratuity in respect of his service up to December 23, 1895, an unfettered discretion as to the amount (provided that the statutory maximum was not exceeded) of the gratuity to be paid to him in respect of his subsequent service.

Sir R. Finlay, K.C., and *Austen-Cartmell*, for the appellant, contended that no gratuity was payable in respect of the subsequent service. If it were, the amount was at the discretion of the Board, and that discretion was not fettered (so long as the statutory maximum was not exceeded) by the exercise of discretion in regard to the previous service. They were entitled to assess it at a nominal sum, especially if they considered the total already awarded as sufficient in respect of the whole period of service.

The respondent did not appear.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The respondent Giddy, who was plaintiff in this action, was an employee in the public service of the State of New South Wales. He entered the service on December 9, 1875. He retired after thirty years' service on September 16, 1905.

On his retirement, in accordance with the provisions of s. 4 of the Public Service Superannuation Act, 1903, he became "entitled to a gratuity not exceeding one month's pay for each year of service from the date of his permanent employment." The gratuity in the words of the enactment was "to be calculated on the average of his salary during the whole term of his employment and to be payable . . . . in the case of . . . . retirement after the commencement of the Public Service Act, 1902, only in respect of service prior to such commencement."

The average of the plaintiff's salary during the whole term of his employment was found to be 23*l.* 10*s.* 1*d.* per month.

On his retirement the Public Service Board awarded him a gratuity or allowance of 454*l.* 11*s.* 1*d.* In arriving at this sum, the Board reckoned his service up to December 23, 1895, but no longer. Under the Act of 1903 he claimed to have his service reckoned up to August 16, 1902, the date of the commencement of the Public Service Act, 1902. He was officially informed by letter from the Crown Solicitor, dated July 6, 1908, that in respect of that claim no further sum could be paid. Subsequently, however, the Public Service Board professed to take his claim into consideration. But instead of awarding a gratuity or allowance calculated on the salary of 23*l.* 10*s.* 1*d.* per month, they struck off the pounds, they struck off the shillings, and allowed him just one penny for each year of service subsequent to December 23, 1895, or sevenpence in all. An award so contemptuous on the face of it seems to import incapacity of some sort on the part of a civil servant thus remunerated or disparaged. There was nothing of the kind. The learned counsel for the appellant hastened to disclaim any intentional slur on the plaintiff's conduct. No fault was to be found with the manner in which he had discharged his duties.

So the plaintiff brought this action to recover the sum of 139*l.* 19*s.* 2*d.*, which would have been the amount of the additional

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allowance at the full rate of 23*l.* 10*s.* 1*d.* for each year of additional service.

A special case was settled by direction of the judge, stating the following questions for the opinion of the Court:—

"(1.) Whether the plaintiff's service, in respect of which the gratuity is payable, should be computed up to the 23rd of December, 1895, or the 16th of August, 1902?

"(2.) Whether, if the said gratuity is payable in respect of services between the 23rd of December, 1895, and the 16th of August, 1902, the said Government is entitled to assess the gratuity payable in respect of the said service at the sum of sevenpence?"

And the special case provided that if the Court should be of opinion that the gratuity was payable in respect of the whole of the service prior to August 16, 1902, and that the Government were not entitled to assess the gratuity payable for service subsequent to December 23, 1895, at sevenpence, judgment should be entered for the plaintiff for 139*l.* 19*s.* 2*d.*, with costs.

The special case came on to be heard in the Supreme Court before Simpson, acting C.J., and Cohen and Pring JJ. All the learned judges were of opinion that the first question must be answered in favour of the plaintiff. On the second question there was a difference of opinion. Simpson, acting C.J., and Cohen J. thought that it could not "be successfully contended that the Government have any right to depart from what they have deliberately done in respect of the plaintiff's service up to the 23rd of December, 1895, and to exercise another and different discretion by allowing him sevenpence only as a gratuity for his subsequent service." Pring J., on the other hand, was of opinion that the Court could not interfere with the uncontrolled discretion of the Government, and that judgment should be entered for the defendant.

Before this Board the ruling of the Supreme Court on the first question was not challenged.

On the second question their Lordships agree in the conclusion at which the majority of the Court arrived. But they are not prepared to hold that the Government were precluded from exercising their discretion by the action which they took at

the time when it was considered that the plaintiff was not entitled to claim in respect of service subsequent to December 23, 1895.

The real question seems to be this, Did the Government, or rather did the Public Service Board, in whose province the matter lay, exercise any discretion at all as regards the plaintiff's claim in respect of service subsequent to December 23, 1895? They have awarded seven pennies for seven years' employment, or, to be quite accurate, they have awarded one farthing for every quarter of a year spent in the service of the Government, and they have thrown in an extra farthing to make even money. Well, this is not the first occasion on which seven years' faithful service has met with a recompense at once unexpected and undesired. That is probably the best that can be said for the action of the Board. But was it reasonable? Was it fair? Few would deem it a generous or handsome tribute to the work of an old and faithful servant even with the extra farthing thrown in. Plain folk would call it a mockery—a sham—a pretence. Nobody, of course, can dispute that the Government or the Board had a discretion in the matter. But it was not an arbitrary discretion, as Pring J. seems to think. It was a discretion to be exercised reasonably, fairly, and justly. The learned counsel for the appellant, who were not apparently in the secrets of the Government, seemed to think that the Board would have stood better in Court if they had not resorted to the artifice of a pretended exercise of discretion. It was suggested that the Board may have thought that the plaintiff had got enough already, and that perhaps on the former occasion they took into consideration years of service beyond the limit which they thought applicable. But, if so, they did unintentionally the very thing they were told by the Act not to do. They can hardly be heard to say that they have erred intentionally in order to conceal or compensate an unintentional error. Whatever their motive may have been, whether they were resolved, right or wrong, to stick to a determination once officially announced, and to let the Service understand that nothing was to be gained by asking for a reconsideration of an erroneous decision, or whether they had some better reason which has not yet been disclosed or discovered, it seems to their Lordships to be

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quite plain that an illusory award such as this—an award intended to be unreal and unsubstantial—though made under guise of exercising discretion, is at best a colourable performance, and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament.

Holding therefore, as they do, that the Government were not entitled to assess the gratuity payable to the plaintiff in respect of service between December 23, 1895, and August 16, 1902, at the sum of sevenpence, their Lordships think that in accordance with the provisions of the special case judgment should be entered for the plaintiff for 139*l.* 19*s.* 2*d.*, with costs. They will humbly advise His Majesty accordingly.

The order giving special leave to appeal provided for the plaintiff's costs of the appeal as between solicitor and client. But as there is no appearance on the part of the plaintiff, the order will be silent as to costs.

Solicitors for appellant: *Light & Fulton.*

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[PRIVY COUNCIL.]

COMMISSIONER OF STAMP DUTIES . . APPELLANT;

AND

CHARLES JULIAN BYRNES AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Stamp Duties Act, 1898, *ss.* 49 *and* 52—*Construction—Intent to avoid Payment of Duty—Transaction effective and not colourable.*

In 1904-5-6 the testator bought properties in the names of his two sons by way of advancement and subsequently received the rents and paid for rates and repairs. He died in 1909.

On a claim made by the Commissioner of Stamps against the executors in respect of the said properties it was contended on his behalf that the testator made these gifts "with intent to avoid payment of duty"

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD ROBSON, and SIR ARTHUR WILSON.

within the meaning of New South Wales Stamp Duties Act, 1898, s. 52, and that there was an implied agreement between the testator and his sons that he was to receive rents and profits during his lifetime:—

Held, that on the evidence the transactions were not colourable, but gifts out and out passing the properties to the sons to the exclusion of all interest in the father. The receipt by the father of the rents did not operate to convert a presumptive advancement in favour of the sons into a trust in favour of the father.

Grey v. *Grey*, (1677, from Lord Nottingham's MSS.) 2 Swanst. 594, followed.

APPEAL from an order of the Supreme Court (March 9, 1910) on a case stated by the appellant under s. 18 of New South Wales Stamp Duties Act, 1898 (27 of 1898).

The question was whether under the circumstances stated in the judgment of their Lordships duty became payable on the death of Bernard Byrnes, the testator, upon certain properties which he had bought in 1904 and 1906 in the names of his sons.

The appellant claimed that duty was payable under s. 49, sub-s. 2 (A) (*e*), or s. 49, sub-s. 2 (B), or s. 52 of the said Act.

Sect. 49, sub-s. 2 (A), so far as material, makes duty chargeable upon: (*e*) All estate whether real or personal passing under any voluntary settlement made by the deceased settlor by deed or any other instrument not taking effect as a will whereby an interest in that property or the proceeds of sale thereof for life, or any other period determinable by reference to death is reserved either expressly or by implication to the settlor or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in that property or the proceeds of sale thereof.

Sect. 49, sub-s. 2 (B), so far as material, makes duty chargeable in respect of: All personal estate (not being chattels real) taken under any gift whenever made by the deceased of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

Sect. 52, so far as material, enacts that "Upon the death of any person who after the 30th day of June, 1880, makes any

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conveyance or gift of any estate with intent to evade the payment of duty under this Act or any Act hereby repealed, such property shall be deemed part of his estate for the purposes of this Act." It also enacts that "any conveyance or gift of property which after the date aforesaid is made to take effect upon the death of the person making the same shall be deemed to have been made with intent to evade the payment of such duty."

The issues raised by the special case were in effect: First, whether the sums paid by the testator in respect of the said properties were taken by the sons respectively as gifts within the language of s. 49, sub-s. 2 (B); and, secondly, whether the said sums or the said properties or the testator's interest under the said contracts for purchase passed to the sons respectively under voluntary settlements made within the language of s. 49, sub-s. 2 (A) (*e*); and, thirdly, whether the testator made conveyances or gifts of the properties or moneys with intent to evade payment of duty within the said s. 52.

The Supreme Court decided that duty was not payable. The judgment of Pring J. contained this passage: "As I said before, the sons impressed me very much by their candour. The whole case as put before me was that we should draw an inference that there was some secret reservation because the father received the rents. It must be remembered that at the time of the transfers and up to his father's death, Charles was living at his father's house and receiving from him very considerable benefits and it may be that the son thought it was a good way to recoup the father for all he was doing for him, but I do not think that there was anything in the shape of an agreement between them. . . . . Here, whatever we may suspect to be behind the scenes, there is no proof. We must have evidence by which we are driven to draw the inference; it must be more than mere suspicion."

Sir R. Finlay, K.C., and *Austen-Cartmell*, for the appellants, contended that this decision was erroneous. The effect of the evidence was that an interest was reserved in the properties in question by the testator within the meaning of s. 42, sub-s. 2 (A) (*e*), and that the gifts were actually made with intention to

evade payment of duty within s. 52; or on the true construction of that section must be deemed to have been so made. Reference was made to *Simms* v. *Registrar of Probates* (1) and *Payne* v. *Rex*. (2)

Levett, K.C., and *A. Adams*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This seems to be a very plain case. It is an appeal by the Commissioner of Stamps for the State of New South Wales against a judgment of the Supreme Court pronounced on a special case stated by the Commissioner. The judgment under appeal disallows a claim preferred by the Commissioner against the executors of a Mr. Byrnes in respect of certain advances made by Mr. Byrnes in his lifetime to two of his sons.

Mr. Byrnes was a gentleman of considerable wealth. In addition to personal estate amounting to 10,000*l.* or thereabouts, he was possessed of land worth about 30,000*l.* Mr. Byrnes died on January 11, 1909. He left five children—three sons and two daughters. The sons to whom the advances in question were made were Charles and Lionel. Charles, who was born in 1877, lived with his father till the father's death; Lionel, who was born in 1884, lived with his father till his marriage in March, 1906.

Mr. Byrnes seems to have treated his family liberally. He was on excellent terms with his sons. The two who lived at home were supplied with everything they wanted, but they had no independent means nor had they any fixed allowance.

Some years before he died Mr. Byrnes bought three properties in the name of his son Charles:

(1.) A property in King Street, Newtown, near Sydney, in 1904;

(2.) A property in Willoughby Road, North Sydney, in 1904; and

(3.) A property in Ernest Street, North Sydney, in 1906.

The aggregate purchase-money of these three properties,

(1) [1900] A. C. 323. (2) [1902] A. C. 552.

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together with costs and stamp duty, has been taken by the Commissioner as being 5772*l.*

In 1905 the testator bought a property in Norton Street, Leichhardt, in the name of his son Lionel. The purchase-money of this property, together with costs and stamp duty, has been taken as being 1366*l.*

The special case, together with certain issues agreed upon between the parties, came on to be heard before Pring J. and a jury of four on December 13, 1909, when it was arranged that the evidence of the two sons Charles and Lionel, who offered themselves for examination, should be taken before the judge and annexed to the special case, and that the matter should be heard and determined by the Full Court, who were to be at liberty to draw inferences and deal with the matter as a jury. The jury in attendance was then discharged.

In delivering the judgment of the Full Court Pring J. stated that he had no hesitation in saying that the two sons who were examined and cross-examined before him were honest, reliable, and truthful witnesses. "They told not only the truth," he said, "but the whole truth. They kept back nothing." And he added, "I implicitly believe them." Charles stated positively that there was no arrangement or understanding whatever on the occasion of any one of the three purchases as to what should be done with the property or the rents coming from it. In the case of the Newtown property, after the completion of the purchase —not very long afterwards—his father said to him, "You had better make arrangements about the collection of those rents, or else, if you like, you can have them paid into my account along with my other rents." He said "very well," and that was the only conversation they had about those rents. As regards the Willoughby property Charles said to his father it would be as well to have the rents paid into his account the same as the rents of the Newtown property, and to this his father assented. The rents of the Ernest Street property were also paid in to the father's account.

As regards the property purchased in Lionel's name, Lionel said that he had no conversation with his father about the property until some time after it was bought, when one day, as

he and his father were driving past, his father said, "These are your two places that I bought for you—you are to be a good boy." That was all that passed. He never had any conversation with his father about the rents, but Charles told him that the rents were collected by an agent and paid in to his father's account, and he was, he said, quite willing that it should be so.

Mr. Byrnes paid the rates on the properties bought in the names of his sons as well as the cost of all repairs.

Now, that is the whole of the evidence in the matter. In these circumstances the Commissioner of Stamps contends—

(1.) That Mr. Byrnes made these gifts "with intent to evade payment of duty" within the meaning of s. 52 of the Stamp Duties Act, 1898.

(2.) That it must be inferred that there was an agreement or understanding between Mr. Byrnes and his sons to the effect that the father was to be entitled to receive the rents and profits during his lifetime.

In their Lordships' opinion there is no ground for suggesting that these gifts or advances were made to the sons "with intent to evade payment of duty" within the meaning of that expression in the Stamp Duties Act, 1898. It has been laid down more than once by this Board that the transactions struck at by the Australian Stamp Duties Acts, which are all on the same lines, are transactions that are merely colourable. In this case the advances were gifts out and out, passing the property to the sons to the exclusion of all interest in the father.

It was argued, but argued faintly, that although it might be that the advances in question were not made with intent to evade payment of duty, yet they must be "deemed" to have been so made in accordance with the provision in the last words of s. 52, sub-s. 1. But that provision applies only when the conveyance or gift "is made to take effect upon the death of the person making the same." In the present case the conveyance took effect on its execution. From that moment the property conveyed vested in the donee. It was his to mortgage, to sell, to deal with in any way he pleased, and if he had become bankrupt in the father's lifetime the property would have passed to the trustee or assignee in his bankruptcy.

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The principal argument on behalf of the appellant was of course devoted to the contention, on the part of the Commissioner of Stamps, that the admitted facts of the case point to an implied reservation for the father's benefit. It was so strange, it was said, that a father should convey property to a son, and that the son should then hand over the rents and profits of that property to the father! To their Lordships the transaction seems not unnatural. Long before death duties assumed their present proportions in taxation, or became an object of terror to mortal men, it was by no means unusual for a father, himself well to do, to transfer property to a son who was not fully advanced, and for the son to let the father take the rents and profits of that property during his lifetime without any previous arrangement or understanding to that effect. Such an advance on the part of the father would be a mark of confidence in the son, and would tend to give the son, who might be wholly dependent on his father's bounty, some sense of independence. In the present case, having regard to the state of the family and the relations subsisting between Mr. Byrnes and his two sons who were living at home, it seems very natural that the sons receiving advances should yet feel a delicacy in taking the fruits during their father's lifetime. They had everything they wanted as things were, and if they were unduly favoured it might possibly have created some feeling of jealousy among the rest. It may be that in making these advances Mr. Byrnes was not insensible to the advantage of diminishing the burthen of death duties, but there is nothing wrong in that. No one may act in contravention of the law. But no one is bound to leave his property at the mercy of the revenue authorities if he can legally escape their grasp. The Commissioner of Stamps detects some sinister object in the transaction which he challenges in these proceedings, and a conspiracy to defraud the revenue. Long ago a famous Chancellor placed a more benignant and a more common-sense construction on similar transactions between father and son. He set down the son's acquiescence in his father taking the rents and profits to "good manners" and "reverence," that is, the respect which a child owes to his parent. In the case *Grey* v. *Grey*, "a very short one but of a very nice and curious debate" decided in

1677, and reported from Lord Nottingham's MSS. in 2 Swanst. 594, Lord Nottingham had to consider in what cases a purchase by a father in the name of his son—a presumptive advancement —may import a trust in favour of the father. His Lordship observes "it is not reasonable that the father's perception of profit, or making leases, or doing such acts as these which the son in good manners does not contradict, should turn a presumptive advancement into a trust." (1) And again, "If the son be not at all or but in part advanced, then if he suffer the father, who purchased in his name, to recover the profits, &c., this act of reverence and good manners will not contradict the nature of things and turn a presumptive advancement into a trust." (2)

In the present case their Lordships do not think there is any substance in the contention put forward on behalf of the Commissioner of Stamps, or even any reasonable ground for suspicion.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Light & Fulton.*
Solicitors for respondents: *Crawford, Chester & Slade.*

(1) 2 Swanst. at p. 599. (2) Ibid. at p. 600.

Applied. HARLING *v.* EDDY. [1951] 2 All E.R. 212.

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WALLIS, SON & WELLS . . . . . APPELLANTS;

AND

PRATT & HAYNES . . . . . RESPONDENTS.

Sale of Goods—Delivery of Goods not of Contract Description—Resale by Purchaser—Condition—Warranty—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 11, 53.

The respondents sold seed to the appellants as "common English sainfoin" on the condition that "sellers give no warranty expressed or implied as to growth, description or any other matters." The seed delivered to the appellants was not "common English sainfoin," but "giant sainfoin," a different and inferior seed. The appellants accepted the seed believing it to be "common English sainfoin" and resold it as such to other parties, to whom the appellants were obliged to pay damages for the mistake:—

Held, that the appellants were entitled to the remedies applicable to a breach of warranty and to recover from the respondents the damages which the appellants had been obliged to pay to the other parties.

Decision of the Court of Appeal, [1910] 2 K. B. 1003, reversed upon the grounds given by Fletcher Moulton L.J., who dissented.

THE circumstances of this appeal are stated in the judgments of this House. Bray J. gave judgment for the appellants, and this decision was reversed by the Court of Appeal (Vaughan Williams and Farwell L.JJ., Fletcher Moulton L.J. dissenting).

Shearman, K.C., and *Herbert Smith*, for the appellants. The delivery by the respondents of giant sainfoin instead of common English sainfoin was not a delivery of the goods agreed to be delivered; it constituted a breach of a condition of the contract. Notwithstanding the acceptance of the seed the appellants were entitled to recover damages for the breach of the condition. This was so before the Sale of Goods Act, 1893, and is consistent with the definition of "warranty" in that Act.

Atkin, K.C., and *Cecil Walsh*, for the respondents, relied upon the judgments of Vaughan Williams and Farwell L.JJ.

The appellants were not heard in reply.

LORD LOREBURN L.C. My Lords, in this case two judges have been in favour of the appellants and two in favour of the respondents, and therefore it is impossible to doubt that there must be room for controversy in regard to the meaning of the important clause of this contract.

It is agreed that this was a sale both parties to which intended that common English sainfoin was to be delivered. It is agreed that it was a condition of the contract that that stuff should be delivered, but it is said that the defendants were absolved from the liability arising from the fact that something different from common English sainfoin was delivered, by virtue of a particular clause in the contract. The clause, so far as relevant, is to this effect: "Sellers give no warranty expressed or implied as to growth, description or any other matters."

Now this sainfoin which was delivered turned out to be a different kind of goods; and when that was found out an action was brought against the defendants as sellers, to which they pleaded the clause I have read.

The law on this subject is to be found in the statute, and I do not wish to obscure the statute by offering any additional commentaries of my own; but I wish to apply it, as I understand the law, to this case.

If a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it was a breach of warranty, that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty ab initio, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty.

I forbear from further observations, because the whole of the

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law has been, if I may say so with respect, admirably expressed in the judgment of Fletcher Moulton L.J. There is no doubt that when you are dealing in a commodity the inspection of which does not enable you to distinguish its exact nature, there are risks both on the buyer and on the seller if they think fit to sell by description. But if it is desired by a seller to throw the risk of any honest mistake on to the buyer, then he must use apt language, and I should have thought the clearer he tries to make the language the better. I do not think he has done so in the clause to which I have referred; and therefore I agree with Fletcher Moulton L.J. and with Bray J. that judgment ought to be entered for the plaintiffs.

Lord Ashbourne. My Lords, I concur. I have read most carefully the judgment of Fletcher Moulton L.J. and I entirely agree with it and am willing to adopt it.

Lord Alverstone C.J. My Lords, I entirely concur with the judgments delivered by the Lord Chancellor and Lord Ashbourne. I only wish to add a few words because it is very important that on this, which I think is the first occasion on which your Lordships' House has had to consider it, the real effect of the Sale of Goods Act should be pointed out.

Prior to that Act there had been a very great deal of litigation and of discussion as to matters which formed only ground of a breach of warranty and matters which amounted to a condition; and the remedies in the one case and in the other were the subject of a great deal of discussion. I think it is desirable to point out at any rate upon the facts of this case, there is a clear distinction which has been recognized by the statute; and when that distinction is borne in mind I agree entirely with the opinion of Fletcher Moulton L.J. that this case does not admit of serious argument.

I will very briefly call attention to what I mean in the statute. I think every section shews that the distinction between "condition" and "warranty" is clearly understood and recognized, and that different remedies are intended to be given in the one

case and in the other. For that reason I submit it is impossible for the respondents to contend that when the sellers said they gave no warranty they meant to say they would not be responsible for any breaches of condition.

My Lords, the definition of "warranty" in the statute is in itself clear upon the point. It says "'Warranty' means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated." As I think my noble and learned friend the Lord Chancellor put it in the course of the argument, could it be fairly suggested that a claim to deliver goods which were not in accordance with the contract could be treated as "collateral to the main purpose of such contract," upon the ground that there was no liability for warranty under the contract?

My Lords, I turn now to s. 11; and again I find the distinction clearly maintained there: "(*a*) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty." Again the two matters are put in opposition the one to the other. Then sub-s. (*b*) says: "Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract." And the words that follow are very remarkable: "A stipulation may be a condition though called a warranty in the contract." Therefore the different position of a "condition" and a "warranty" appears upon the face of the section. Finally clause (*c*) of the same section says: "Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods" —shewing that, for the purpose of the remedy, that which gave

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different rights up to a certain point is only to be "treated as a breach of warranty" when this state of things has arisen.

I turn for a moment to s. 13; and we find again there that that which might have been described as a "warranty," if it was so intended, is described as a "condition." This refers to the very point which has been so much argued by Mr. Atkin in his able argument at your Lordships' Bar: "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description" —not an implied warranty, but "there is an implied condition." The reason is because, if there is a breach of a condition, there follows the right to reject; if the goods tendered to you are not in accordance with the description, then you have the right which flows from its being a condition of the contract as distinguished from being only a warranty.

Then finally, my Lords, clause 53 says: "Where there is a breach of warranty by the seller or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods."

My Lords, I believe there are no other sections in the Act of Parliament to which it is necessary to refer. These sections have been all very clearly dealt with by the learned counsel at the Bar, and, as has been pointed out, in each and all of those sections there is the distinction between "warranty" and "condition" and the different consequences flowing from the one stipulation and the other.

My Lords, all I can say is I think it is quite impossible to suggest that in the year 1906, when these parties made a contract whereby they required that the goods should be common English sainfoin, and the sellers put in a stipulation that they would not give any warranty, express or implied, it was intended that it was always to be understood that they were not making themselves liable in regard to any condition as to the goods or for the consequences of a breach of the condition.

My Lords, I thought it right to add these few words because I think it is very important to bear in mind that the rights of people in regard to these matters depend now upon statute. To

a large extent the old law, I will not say has been swept away, but it has become unnecessary to refer to it. Within the four corners of this statute applicable to this contract we see this plain distinction between "condition" and "warranty," which has, I venture to think, been rather overlooked in this case by the majority of the judges in the Court of Appeal.

I concur respectfully in the motion which has been made by my noble and learned friend on the woolsack.

Lord Alverstone C.J.

Lord Shaw of Dunfermline. My Lords, the judgment of Fletcher Moulton L.J. appears to me, had I not had the pleasure of listening to the judgments which your Lordships have pronounced, to cover this case, and I feel hesitation in adding any words of my own. But I will make reference only to s. 13 of the statute.

Sect. 13, my Lords, applies to the case of goods sold by sample plus description. In the present case the goods were sold by sample, but the sample was not considered sufficient, and a description had to be added. When the bargain was made, samples were shewn and relied upon, but the description of the goods was not embraced in the contract when it was put in writing. Thereupon the vendee insisted that the description of the goods should be entered upon the contract, and this was done, the goods being described as "common English sainfoin."

My Lords, that description could by no circumstance have been more clearly certiorated as entering into the very essence of this contract and being one of its conditions. What has been delivered has been "giant sainfoin"—a thing as distinct in agricultural knowledge from common English sainfoin as in ordinary commerce a silver watch would be distinct from a gold watch.

It is now said, however, my Lords, that these two merchants, contracting with each other, when they used the word "warranty," used it in an ambulatory sense. "Warranty" was, according to the argument so ably presented to us by Mr. Atkin, to mean one thing in certain events and another thing in other contingencies.

My Lords, I do not think that these two English commercial men meant "warranty" in a sense of any greater refinement

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than the breadth of the definition in the Sale of Goods Act: and under the Sale of Goods Act it is as plain as language can make it that there are two things that are dealt with under different categories. The one is "warranty" and the other is "condition"; and it is only when you have to approach the question of finding the remedy which the statute prescribes that in the option of the person injured a condition may be converted into or rather for remedial purposes be regarded as equivalent to a warranty.

My Lords, the only other observation I desire to make is that I view with some suspicion, if not with repugnance, any system of construing a contract ex post facto. In the case of *Ellen* v. *Topp* (1), that very learned judge, Pollock C.B., observed: "It is remarkable" (and indeed it would be most remarkable) "that according to this rule, the construction of the instrument may be varied by matter ex post facto." My Lords, whoever heard in a commercial contract of construing the meaning of two business men by a principle of that kind? I cannot agree with the opinion in *Ellen* v. *Topp* (1); that opinion, in my judgment, is no part of English law. I think it is a safer thing to construe this document as it was originally meant to be construed—that is to say, according to the evident intention of the contracting parties at the time the bargain was made.

I find that the language of the statute equates with that intention; and the judgment pronounced by Fletcher Moulton L.J. is, in my opinion, in accord not only with the justice of the matter but with the actual meaning of seller and of buyer.

Order of the Court of Appeal reversed and judgment of Bray J. restored with costs here and in the Court of Appeal.

Lords' Journals, May 5, 1911.

Solicitors: *Rooke & Sons, for Brain & Brain, Reading; Andrew Walsh, Gray & Rose.*

(1) (1851) 6 Ex. 424, 441. [The rule there stated relates to the dependence or independence of covenants and is not particularly concerned with the sale of goods. The Court, approving of the rule, held it not applicable to the case before them. —F. P.]

[HOUSE OF LORDS.]

MURPHY . . . . . APPELLANT; H. L. (I.)
1911
AND
THE KING . . . . . RESPONDENT. *May* 12.

Old Age Pension—Decision of Local Pension Committee—Statutory Conditions—Jurisdiction—"Final and conclusive"—Old Age Pensions Act, 1908 (8 *Edw.* 7, *c.* 40), *s.* 7, *sub-s.* 2.

An applicant for an old age pension who had not in fact attained the age of seventy was awarded a pension by the local pension committee and was paid the pension. No appeal against the award was brought in the manner prescribed by the Old Age Pensions Act, 1908. Afterwards new facts relating to the age of the pensioner came to the knowledge of the pension officer, who thereupon raised a question in the manner prescribed by the Act to the effect that the pensioner was not entitled to the pension as she was not yet seventy. The local pension committee decided to continue the pension, and the pension officer appealed to the central pension authority, who deprived the pensioner of the pension:—

Held, that the original decision of the local pension committee was invalid, as the applicant had not fulfilled the statutory condition as to age, and that notwithstanding s. 7, sub-s. 2—which enacts that "the decision of the local pension committee on any claim or question which is not referred to the central pension authority . . . . shall be final and conclusive"—it was competent for the pension officer to raise the question and for the central pension authority to deprive the pensioner of the pension on the ground of her real age.

Decision of the Irish Court of Appeal, [1911] 2 I. R. 88, affirmed.

In October, 1908, Elizabeth Murphy made a claim for an old age pension under the Old Age Pensions Act, 1908. The claim was duly adjudicated upon by the local pension committee in December, 1908, and she was held entitled to an old age pension at 5*s*. per week. No appeal was brought against that decision, and she was paid the pension till May, 1909. In March, 1909, the pension officer reported to the local pension committee that in his opinion Elizabeth Murphy was not entitled to any pension as she had not yet reached the age of seventy. The local pension committee refused to alter their previous decision, and the pension officer appealed to the central pension authority, the Local Government Board, who decided in May, 1909, that

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Elizabeth Murphy was not entitled to any pension, she not being seventy years of age. She then brought a petition of right claiming the pension. The petition was dismissed by Dodd J. upon the authority of *Sinnott's Case* (1), and that decision was affirmed by the King's Bench Division in Ireland (Madden, Kenny, and Wright JJ.) and again by the Irish Court of Appeal (the Lord Chancellor, Holmes and Cherry L.JJ.). Hence this appeal.

James O'Connor, K.C., and *Edmond Lupton* (both of the Irish Bar), for the appellant. The question at issue upon the petition of right is as follows. If the claim of a claimant to an old age pension under the Old Age Pensions Act, 1908, is allowed and no appeal is taken from the decision, has the central pension committee or the Local Government Board jurisdiction at all? And if under any circumstances then under what circumstances is there jurisdiction to reopen the claim upon an allegation that the claimant is not seventy years of age, and to decide that the claimant has not attained that age and is not entitled to a pension?

The material sections of the Old Age Pensions Act, 1908, are ss. 1, 2, 3, 7 and 9. Sect. 7, sub-s. 2, is the most important. It says "The decision of the local pension committee on any claim or question which is not referred to the central pension authority, and the decision of the central pension authority on any claim or question which is so referred to them, shall be final and conclusive." Those words literally apply to and cover the question which arises here, and they cannot be ignored or explained away. The claim of the petitioner is that the determination of the local pension committee upon the question of age was in the words of s. 7, sub-s. 2, "final and conclusive"; that accordingly there was no power to reopen or reconsider her status or right to the pension upon the question of age; and that in the absence of fraud (which was not suggested here) there was no jurisdiction to enter upon the inquiry which resulted in the decision or purported decision of the Local Government Board.

In the alternative the petitioner claims that if the attaining of

(1) [1910] 2 I R. 403.

the age of seventy years was a condition precedent to the jurisdiction to make the order of December, 1908, that order, which is not challenged in the plea to the petition as being without jurisdiction, is at least prima facie evidence of the petitioner having attained the age of seventy and having acquired the status of a pensioner under the Act. Sect. 9 applies only to cases of fraud, and the liability under s. 9, sub-s. 2, to repay to the Treasury any sums paid while the statutory conditions were not fulfilled does not exist where there is no fraud. The decision of *Sinnott's Case* (1) and of other cases cited below have no bearing here, or if they have are unsound. The decisions of the Courts below should therefore be reversed (1.) because there was no jurisdiction to enter upon the inquiry and to make the order of May, 1909; (2.) because the decision of the local pension committee embodied in the order of December, 1908, was final and conclusive on the question of age; (3.) because the order of December, 1908, which is not challenged as being without or in excess of jurisdiction, itself afforded prima facie evidence of the age of the petitioner and of her having fulfilled the necessary conditions to entitle her to receive a pension.

Barry, A.-G., Ronan, K.C., and *W. E. Wylie* (all of the Irish Bar), for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, I think this appeal must fail. It is unnecessary to enter upon a statement of the facts, which are short and agreed so far as the decision is concerned.

Certain conditions are laid down in the Act of Parliament which must be fulfilled in order that any person should be entitled to a pension; and if any doubt arises whether the conditions continue to be fulfilled, then under s. 7, sub-s. 1, of the Act the question goes first to the local pension committee, who are to give their decision, but the pension officer may appeal to the central pension committee. If there is not an appeal, then the local committee's decision is final, but if there is an appeal, then the central committee's decision is final and conclusive.

(1) [1910] 2 I. R. 403.

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In this particular case, after the local committee had decided and no appeal had followed, the question was raised whether one of the conditions, that relating to the age, continued to be fulfilled. That point was taken to the local committee, who thought that the condition was fulfilled, or at all events that they were not entitled to reverse the previous decision; and then it went on appeal to the central committee and was found adversely to the claimant. It is quite clear that the finding of the central committee was final and conclusive so far as that question went, if they had jurisdiction.

The real argument that is put forward by the learned counsel, who have argued it extremely well, if I may be allowed to say so, and with a brevity which adds point and force to their argument, is that the words in s. 7 "whether those conditions continue to be fulfilled" cannot be applied to the condition of age, because when any one is once seventy he must be always seventy and there is no part of the United Kingdom so fortunate that people grow younger in it.

I do not think that is the accurate view. Sect. 9 evidently contemplates the possibility of error, and the claimant being obliged to recoup the Treasury for what has been paid in error, it would be very unlikely indeed that there should be no machinery in an Act like this to provide for a case like that.

If the argument of the learned counsel for the appellant is right, then this strange result would ensue: that the applicant would be continually entitled to be paid and, at the same time, the Crown would be continually entitled to be repaid. That is a conclusion I should not arrive at unless I found that there was no other way of construing this Act.

I think the true view is that if at any time any one of the statutory conditions is not truly fulfilled, then the machinery may be placed in motion and the question may be brought before the local committee, and then there may be an appeal to the central committee. The question is open whether the condition is at that date fulfilled or not. It is true that the result of so holding is to allow the question of age to be raised repeatedly by the Crown. The same is also true of the claimant, for the claimant may repeatedly renew the application. I cannot see

that there is injustice in that. I do not know myself how, in any other way, you can prevent the perpetuation of wrong payments or of wrong exclusions on one side or another; at all events I think that is the way that the Act of Parliament has provided. It is impossible to prevent by Act of Parliament unreasonable process or litigation; all you can do is to provide the means for redressing errors which have been made.

Under those circumstances I think that the conclusion at which the Court of Appeal in Ireland has arrived is the right conclusion, and that this appeal must consequently be dismissed.

LORD ASHBOURNE. My Lords, I concur. The case has been argued with very great force, ability, and ingenuity, but the task that was set before the learned counsel who argued the appeal was an extremely difficult one, and it would really require the Act of Parliament to be drafted differently to give force to many of their contentions. I do not at all say that the Act of Parliament is drawn in the best or the clearest or the most satisfactory way. It must be obvious to any lawyer, as a result of the discussions that have taken place upon it, that some of the sections might have been drafted with more precision and more clearness; but the Act of Parliament must be interpreted as it stands, and I think as it stands, and taking all its sections together, no real force can be given to the contentions which have been addressed to us on the part of the appellant here. The great governing condition of the whole statute is the age of seventy; that is the great initial fact underlying the whole jurisdiction; and the contention presented to us with such force to-day is this, that once it is found by the local or by the central pension authority that the party applying is entitled, that is the governing and final ascertainment of the pensionable status which never can afterwards be interfered with or questioned.

The words relied upon in support of that are in s. 7, sub-s. 2, that that finding is to be "final and conclusive"; but that is to be taken in connection with the subject-matter and with the whole section. There are many things in sub-s. 1 of s. 7 which indicate what is the meaning that may be given to the words

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"final and conclusive"; and still more may be found in the section which Mr. O'Connor applied himself so forcibly to grapple with, that is s. 9.

It is obvious from s. 9, and from some of the other sections, that it was never intended for a moment that there should not be some way of acting upon the ascertainment of the fact that the governing figure of seventy had been reached erroneously. The whole jurisdiction would fall to the ground once it is ascertained that the person who has applied has not attained the age on which alone jurisdiction would attach.

I take that s. 9 that has been so much referred to. That indicates that it was contemplated that it might be necessary in the interests of the public, the interests of justice, and the interests of fair play to examine the question and see whether there was any real question underlying the original ascertainment of the right of the pensioner. Sub-s. 1 was to deal with a very obvious case. It might have been widened, there might have been more words put in; mistake might have been put in, accident and other circumstances might have been put in, as well as the particular words found in that subsection. But sub-s. 2 of s. 9 is, I think, a stronger and more important section to go upon, although sub-s. 1 is extremely important. The words of sub-s. 2 are these: "If it is found at any time that a person has been in receipt of an old age pension under this Act while the statutory conditions were not fulfilled in his case, or while he was disqualified" and so on, he should be compelled to repay. Well, surely, it is impossible to find words that indicate more plainly that there could not have been a final and conclusive ascertainment beforehand, that was never to be inquired into, when the Legislature in this subsection said "If it is found at any time." An argument has been addressed to us on the word "found." What is the meaning of the word "found"? I am not concerned to put a rigid meaning upon that, whether it is "determined" or "ascertained," or whether it simply means in common language "found out." It is quite enough for the purpose the Legislature had before its eyes that it might be ascertained later, it might be found, it might become a great new fact which

would sweep away the right to the pension originally. All that is preserved abundantly by sub-s. 2, and would it not, my Lords, add an element of absurdity to say that the person in respect of whom I might say a mistake had been found out,—I do not want to use any hard or disagreeable words—or in respect of whom it had been ascertained that the pension had been erroneously paid, was not bound to pay it back? Would it not be almost absurd to say that a previous section had compelled the pension authorities to go on paying with one hand while the State would have the right to intervene and to compel that hand to disgorge without delay?

My Lords, I do not think I would be justified in saying anything more in reference to the matter. I have said those few words in deference to the argument that has been addressed to us in order to shew that I have applied my mind to the topics which have been so clearly and forcibly pressed upon us, but I think your Lordships will do well to adopt the motion moved by my noble and learned friend on the woolsack and affirm the decision of the Court of Appeal in Ireland.

LORD ALVERSTONE C.J. My Lords, I concur with the reasons stated by the Lord Chancellor and by my noble and learned friend Lord Ashbourne so entirely upon every ground that I only desire to add one more which has occurred to me.

The argument of Mr. O'Connor makes it necessary to say that, when any question arises in respect of a person who is in receipt of a pension as to whether the conditions continue to be fulfilled, the question of age cannot be inquired into because there had been a previous inquiry.

Now, my Lords, it is quite obvious that the statute contemplates this tribunal dealing with all questions which arise after there has been some determination as to the pension; because under sub-s. 1 of s. 7 there arises the question whether the conditions continue to be fulfilled. The only words Mr. O'Connor has been able to refer to, in order to support that argument, are the words at the end of sub-s. 2 of s. 7, that the decision "shall be final and conclusive."

My Lords, to my mind it is going much too far to suggest

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that those words are sufficient to override the condition which my noble and learned friend Lord Ashbourne has pointed out in the words of the statute, that before a person can receive a pension he must have attained the age of seventy; and therefore it seems to me that when a question is raised before the competent authority as to whether the conditions have been fulfilled, it must be within the power of that tribunal to say whether or not there has been an error in the supposed existence of the fundamental condition without which the pension cannot be granted.

I think, therefore, my Lords, for the reasons your Lordships have given, with which I entirely agree, this appeal should be dismissed.

LORD ATKINSON. My Lords, I concur, and I do not think it necessary to add anything to what has been said by my noble and learned friend on the woolsack and by the noble and learned Lords who have preceded me.

LORD SHAW OF DUNFERMLINE. My Lords, I concur. I agree especially with the judgment which the Lord Chancellor of Ireland has delivered in this case. Had it not been for the interesting and ingenious argument which has been delivered at the Bar, I should myself have found it hardly conceivable to think that the point was capable of elaborate argument.

Order of the Irish Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 12, 1911.

Solicitors: *George Gavan Duffy, for M. J. O'Connor & Co., Dublin; Beveridge, Greig & Co., for T. T. Mecredy & Son, Dublin.*

[HOUSE OF LORDS.]

KOFFYFONTEIN MINES, LIMITED . . . APPELLANTS; AND MOSELY . . . . . RESPONDENT.

H. L. (E.) 1911 *May* 29.

Company—Directors—Power to increase Capital—Creation and Issue of Shares—Memorandum and Articles of Association—Alteration by Special Resolution.

By the original articles of a limited company it had the power in general meeting both to create and issue new shares on such terms as it thought fit. Upon the true construction of certain articles the power of creating, not the power of issuing, was transferred to the directors:—

Held, that although the language of article 9 was general the generality of it was restrained by the obvious effect and the obvious intention of the 53rd and 59th articles, and that the directors had not power to issue new shares without the authority of a resolution in general meeting.

Decision of the Court of Appeal, [1911] 1 Ch. 73, affirmed.

THIS appeal turned entirely on the construction of the articles of the company. The case is reported in the Court of Appeal (1) and all the details are fully given in that report.

Sir R. B. Finlay, K.C., and *Upjohn, K.C.* (*Jessel, K.C.*, and *J. W. M. Holmes* with them), for the appellants.

Buckmaster, K.C., *Clauson, K.C.*, and *Greenwood*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, I think the decision of the Court of Appeal, which has been fully and ably canvassed in argument at the Bar, is well founded. It is not a question of any general importance, but merely a question of how the articles of this company ought to be construed.

By the 53rd article the directors are authorized, but not compelled, to create new shares. By article 59 the company may by a resolution at general meeting issue generally on such terms as the resolution declares, and the shares may be preferred or deferred, or they may be issued upon any other terms.

(1) [1911] 1 Ch. 73.

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Those two articles must be read together. If the appellants are right the powers given to the company under article 59 might be frustrated and indeed would be in fact nugatory. That is not conclusive, but it is a point to bear in mind.

In both article 53 and article 59 there is a marked contrast drawn between creation and issue, words which have a somewhat general meaning. In the original articles this company in general meeting had power both to create and issue new shares on such terms as it thought fit; and only the power of creating, not the power of issuing, has been transferred to the directors. It seems to me that these directors have not power to issue new shares without the authority of a resolution in general meeting; and although the language of article 9 is general, yet the generality of it is restrained by the obvious effect, and I think the obvious intention, of the 53rd and 59th articles. This appeal must be dismissed.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I think the creation and the issue of new shares in this company are dealt with by two specific articles, the former by article 53 and the latter by article 59.

In the year 1895 certain alterations were made in the former, but neither then nor at any time since has any alteration or repeal been effected with regard to article 59.

My Lords, the issue of shares, as apart from the creation, is a most important transaction; and in gremio of these articles it is observed that this issue can be effected either at par or with a premium, and the shares to be issued may be deferred, they may be preferred, they may be issued with or without voting power, or they may be merely ordinary shares. To say that an alteration with regard to the transaction of the creation of shares effected in the year 1895 has had the effect of wiping out these entire powers of the company in general meeting under article 59 is to say a thing which I cannot, my Lords, affirm.

It humbly appears to me that the judgment of the Court of Appeal is correct.

LORD ROBSON. My Lords, the question in dispute is whether the amendment of article 53 enables the directors to issue as well as create new shares. It is desirable, therefore, first to construe the articles as amended and then see what exactly is the scope of the alteration. Article 53 originally gave the company the power to increase its capital by the creation of new shares, but said nothing about the time or manner or conditions of their issue. That, said Mr. Upjohn, is determined by article 54, which directs that all new shares shall be offered to members in proportion to their existing shares, and so far as members decline to take them they are to be disposed of by the directors as they think most beneficial to the company. According to the appellants this article shews that the issue was always to be left entirely to the directors, and they crave in aid of this construction the terms of article 9, which provides that the shares shall be at the disposal of the directors, who may allot them to such persons at such times and on such terms as they think proper.

This argument, however, overlooks article 59, which deals with the conditions that may be attached to the new shares when issued and the premium or price at which they may be sold. That article comes under the general heading of "Preference Shares," but that is obviously inaccurate. It provides that "Any new shares from time to time to be created may from time to time be issued with any such . . . . right of preference . . . . or at such a premium or with such deferred rights as compared with any shares previously issued . . . . and generally on such terms as the company may from time to time by resolution of a general meeting declare." This article must be read with the other articles referred to. It evinces a natural and reasonable intention on the part of the shareholders themselves to deal with shares created under article 53 as and when they come to be issued, or turned from merely nominal into effective capital. The construction given by the appellants to articles 9 and 54 would nullify the provisions of article 59 and enable the directors, the moment the shares were created, to dispose of them at any price.

The wide powers apparently given by article 9 and the

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obligation to offer them to existing members under article 54 do not arise until the character and price of the shares have been determined under article 59. The distinction between the creation of shares and their issue thus established by the original articles is not affected by the subsequent amendments. The amendment of article 53 merely substituted a resolution of the directors for the resolution of a general meeting so far as the creation of new nominal capital was concerned, and article 54 was deleted; but the control by the shareholders over the terms, conditions, and price to be attached to the shares on issue according to the terms of article 59 was left untouched. The appellants contended that article 59 applied only when it was desired to attach special conditions to the shares, e.g., to make preference shares, but did not apply to the issue of ordinary shares. This contention overlooks the important question of the issue of the shares at a premium and the possibility that the shareholders might desire to postpone the new shares to their own. I think, therefore, that the attempt of the directors to issue fresh capital without authority from a general meeting is unauthorized by the articles as they stand. It is perhaps desirable also to add that in construing the articles as they stand I do not wish it to be supposed that I am in any way affirming or approving the contention of the appellants that the resolution purporting to confer on the directors the power of creating new capital at their uncontrolled discretion is intra vires. That point has not been argued before your Lordships.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 29, 1911.

Solicitors: *Ingle, Holmes, Sons & Pott; Cohen & Cohen.*

[HOUSE OF LORDS.]

OWNERS OF S.S. RAPHAEL . . . . . APPELLANTS;

AND

BRANDY . . . . . RESPONDENT.

H. L. (E.)
1911
June 1.

Employer and Workman — Compensation — Amount — Seaman—Member of Royal Naval Reserve—Concurrent Contracts of Service — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 9, *sub-s.* 1; *Sched. I., par.* 2 (*b*).

A stoker on board a merchant ship, who was entitled to wages from the shipowners, and also as a stoker in the Royal Naval Reserve to 6*l.* a year as a retainer, was injured by an accident on the ship which disabled him from continuing to serve in the Royal Naval Reserve:—

Held, that the stoker was entitled under the Workmen's Compensation Act, 1906, to compensation from the shipowners not only in respect of his wages but also of the retainer, which must be taken into account as earnings under a concurrent contract of service.

Decision of the Court of Appeal, [1911] 1 K. B. 376, affirmed.

THE circumstances of this appeal appear from the head-note. The regulations applicable to Royal Naval Reserve stokers are set out in the report, [1911] 1 K. B. 376, and need not be repeated here. The learned county court judge held that the stoker was entitled to compensation both in respect of the wages and of the retainer, and this decision was affirmed by the Court of Appeal (Cozens-Hardy M.R. and Fletcher Moulton L.J., Farwell L.J. dissenting). Hence this appeal.

Atkin, K.C., and *Segar*, for the appellants. The enrolment of the stoker in the Royal Naval Reserve was not a contract of service under which he worked concurrently with his employment by the shipowners: no work was done by him for the Crown during that employment. A contract of service between the Crown and a sailor cannot be enforced by the sailor: see *Grant* v. *Secretary of State for India in Council* (1), *Mitchell* v. *The Queen* (2), and *Dunn* v. *The Queen*. (3) If the enrolment was a contract of service it was not concurrent with but consecutive upon that employment. He had not to do one stitch of work in order to

(1) (1877) 2 C. P. D. 445. (2) [1896] 1 Q. B. 121, n.
(3) [1896] 1 Q. B. 116.

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receive the retainer. To perform any actual service in respect of his enrolment in the Reserve the stoker must determine his contract with the shipowners. If any work had been done by him in respect of his enrolment he would have been a person in the naval service of the Crown, and that employment could not have been regarded by the county court judge: see s. 9 of the Workmen's Compensation Act, 1906, which says that the Act does not apply to persons in the naval or military service of the Crown. Money paid in respect of naval service is not earnings under Sched. I., par. 2 (*b*).

Stewart-Brown and *H. Harding*, for the respondent, were not heard.

LORD LOREBURN L.C. My Lords, I think the judgment appealed from was quite right.

Sect. 9 of the Workmen's Compensation Act, 1906, does not appear to me to apply to this case at all. I agree with the Master of the Rolls that the object and effect of s. 9 was only to exempt the Crown from being rendered liable under the Act. The rights and liabilities created by the Act do not apply to cases between the Crown and persons in its military and naval services.

A point was made before your Lordships which does not appear to have been made in the Court below, that there was no contract with the Crown at all here. The authorities cited go no further than to say that when there is an engagement between the Crown and a military or naval officer the Crown is always entitled to determine it at pleasure, and that no obligation contrary to that would be recognized or valid in law.

It was then said that there were not here concurrent contracts. I agree with Fletcher Moulton L.J. that this is almost a typical case of concurrent contracts, because the workman was being paid wages for his service on board a merchant ship, and at the same time he was earning his 6*l.* a year by virtue of his engagement with the Crown; and he was giving an equivalent for that, because he was keeping himself fit and doing the work which he stipulated to do.

In regard to the contention that the Crown was not an "employer," that is only another way of putting the point

which I think cannot be sustained on the construction of the 9th section. It is manifest that the Act contemplates that the Crown may be an employer and has, I think, so intended in the schedule to the Act.

Lord Atkinson. My Lords, I concur.

Lord Shaw of Dunfermline. My Lords, in the case of naval and military service one of the substantial rationes contractûs is that there shall be peril to life and limb and possible sacrifice of either or both. In such circumstances the Act of Parliament provides that the Crown as the employer should not be liable to the consequences imposed upon employers in general under the Workmen's Compensation Act in respect of accidents. Accordingly s. 9 of the statute is inserted, the only object of such insertion being to exclude the Crown from the range of the compensation in a contract of that character.

My Lords, beyond that it appears to me that there was in this case service under the Crown. It appears to me further that the Crown was the employer, and I agree that this was a typical case of concurrent contracts of service. Concurrent contracts, my Lords, under Sched. I. (2.) (*b*) are contracts running concurrently in respect to employments or services which are successive and separate. That is precisely the case which is under the consideration of the House.

My Lords, I will only say one word further, and that in reference to the judgment of the learned Lord Justice Farwell, in which there appears a very striking construction of s. 9 of the statute. He says that the words "This Act shall not apply to persons in the naval or military service of the Crown" are to be construed in this way. "I am of opinion," he says, "that the effect of s. 9 is to exclude the Crown and persons in the naval or military services of the Crown from the operation of the Act"; and he goes further and he says "Sect. 13 must accordingly be read as if the words 'other than the Crown' were written into the definition of 'employer' and the words 'other than persons in the naval or military services of the Crown' were written into the definition of 'workman.'"

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My Lords, if that literal construction be adopted, it is perfectly clear that, once you have established that this unfortunate workman being a member of the Naval Reserve was in the naval service of the Crown, he is deprived of all and every benefit conferred by this statute, whether in respect of service under the Crown or any other kind of service. My Lords, I cannot so read this clause in the Act of Parliament. The effect of such a reading would be that it would write all such workmen out of the category of workmen to be benefited, although they were in the service of a subject employer for nineteen-twentieths of their time and only in the service of the Crown for the remaining one-twentieth. I do not think the Act of Parliament can be so construed.

My Lords, on the merits of the point as to estimate arising out of the concurrency of the contracts there is a consideration referred to by the Master of the Rolls, namely, that the disablement incurred by this workman has been a disablement not only affecting his service for the subject employer for whom the servant was then working, but has been such as to prevent him from continuing to serve in the Naval Reserve and so causing him the loss of his retaining fee of 6*l.* per annum. In calculating the scale of compensation it appears to me that the sound construction of the Act and an accurate principle as to the measure of loss and injury both happen to concur. The result reached by the majority of the Court of Appeal humbly appears to me to be sound.

LORD ROBSON. I concur.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 1, 1911.

Solicitors: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool; Windybank, Samuell & Lawrence, for Fox & Bradley, Liverpool.*

[HOUSE OF LORDS.]

KITCHENHAM (PAUPER) . . . . . APPELLANT; H. L. (E.) 1911

AND

OWNERS OF S.S. JOHANNESBURG . . . RESPONDENTS. *June* 2.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Return to Ship—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A sailor, having been on shore with leave, while returning to the quay fell into the water and was drowned. The access to the ship from the quay was by a gangway which was properly lighted. There was no evidence whether he had or had not reached the gangway when he fell:—

Held, that the accident arose in the course of the deceased's employment, but not out of the employment.

Decision of the Court of Appeal, [1911] 1 K. B. 523, affirmed.

FOR the purpose of this appeal the facts are sufficiently stated in the head-note.

E. M. Pollock, K.C., and *S. J. Duncan*, for the appellant.

Atkin, K.C., and *Alexander Neilson*, for the respondents, were not heard.

LORD LOREBURN L.C. My Lords, I think this appeal fails. It is another of the very numerous cases in which the question is whether an accident arose "out of and in the course of" the workman's employment, words which admit of inexhaustible varieties of application according to the nature of the employment and the character of the facts proved. The facts in different cases are infinitely different; and if we were upon each argument to discuss them and to differentiate one from another, judgments in Courts of law would be interminable and would lead rather to confusion than to enlightenment.

I will only say that I agree with Fletcher Moulton L.J.'s opinion. In my view he accurately states the decision of this House in the case of *Moore* v. *Manchester Liners*. (1)

(1) [1910] A. C. 498.

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Lord Loreburn L.C.

In the present case, we are to say first whether this accident was in the course of the employment. I think it was. The return of this man to his ship was in the course of his employment.

We are next to say, did the accident arise out of his employment? I think not. Upon the findings of fact which the county court judge states, while at the same time giving his view of the law, I think the accident arose from a risk common to every one, namely, that of falling from the quay into the water, and was not specially connected with his work and employment.

I therefore move your Lordships that the appeal be dismissed.

LORDS ATKINSON, SHAW OF DUNFERMLINE, and ROBSON concurred.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, June 2, 1911.

Solicitors: *John J. Hands & Lindo; Botterell & Roche.*

[HOUSE OF LORDS.]

JOHN D. HOPE & CO. AND ANOTHER . . . . APPELLANTS; H. L. (SC.) 1911

AND

GLENDINNING . . . . . RESPONDENT. *June* 26.

Stock Exchange—Broker and Client—General Lien.

Stockbrokers who have received transfers of stock or shares for delivery to a customer have by the law of Scotland a general lien on these transfers for the balance due to them by the customer.

The appellants, stockbrokers in Edinburgh, claimed to retain in their hands an uncompleted transfer of shares purchased and paid for by the respondent until a claim by the appellants arising out of a subsequent transaction between them and the respondent was satisfied:—

Held, reversing the decision of the Second Division of the Court of Session, that the appellants as stockbrokers had a general lien on the transfer in question until the claim against the respondent was satisfied.

APPEAL from an interlocutor of the Second Division of the Court of Session, Scotland (1), dated December 9, 1910, which recalled an interlocutor of the Lord Ordinary (Lord Mackenzie) dated June 17, 1910.

The facts are given very fully in the opinions of the Law Lords.

1910. Dec. 17, 20, 21. *Younger, K.C.*, and *Sandeman, K.C.* (with them *J. Smith Clark*) (the two latter of the Scottish Bar), for the appellants. The English text-books and cases recognize a stockbroker's lien and in Scotland it requires slight proof to establish it. *Sibbald* v. *Gibson & Clark* (2) differs very slightly from the present case. There a general lien was upheld in the case of a mercantile agent. [They also cited Bell's Commentaries, ed. 1870, vol. 2, pp. 106-7, 109-10, 112, 113; *Ireland* v. *Livingston* (3); *Jones* v. *Peppercorne* (4); *In re London*

(1) 1911 S. C. 209.
(2) (1852) 15 D. 217.
(3) (1871) L. R. 5 H. L. 395, at p. 416.
(4) (1858) 28 L. J. (Ch.) 158.

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JOHN D. HOPE & CO. v. GLENDINNING.

and Globe Finance Corporation (1); *Strong* v. *Philips & Co.* (2); and *Robertson's Trustee* v. *Royal Bank of Scotland.* (3)]

Morison, K.C., and *W. T. Watson* (with them *D. A. Guild*) (all of the Scottish Bar), for the respondent. The lien of a stock-broker must be established by evidence of custom. No such custom was proved to exist in Scotland; and moreover there is no case in Scotland holding that such a lien as is claimed here, namely, a lien on an uncompleted document, is valid. [They commented on *National Bank of Scotland* v. *Dickie's Trustee* (4); *In re London and Globe Finance Corporation* (1); Bell's Principles, 1445, 1446; and Bell's Commentaries, 5th ed., p. 91.]

The House took time for consideration.

1911. June 26. LORD ATKINSON. It is not disputed in this case that on September 1, 1909, the appellants, on behalf of the respondent and as his brokers, purchased 200 Globe and Phœnix mining shares for a sum, including brokerage and contract stamp and transfer and registration fee, of 865*l.* Neither is it disputed that the respondent, by his letter of September 15, 1909, repudiated that transaction and refused to carry it out. It is conceded that, if the respondent was not entitled thus to put an end to the contract, the appellants were entitled to sell those shares against him and recover any loss they sustained on the resale. The plaintiffs resold the shares, and in my opinion the whole trial proceeded on the assumption that on that resale and by means of it the appellants had lost 50*l.* 2*s.* That is absolutely plain, and is, I think, found as a fact by the Lord Ordinary. The respondent justified his repudiation of his contract on the ground that he had not only instructed the appellants on September 9, 1909, to sell these 200 shares for cash and settlement on September 10, the day following, which is undoubted, but that the appellants contracted to do this, i.e., bound themselves to do that which they had, in a letter written on the very same day before the absolute contract to sell is alleged to have been entered into, stated could not be done.

(1) [1902] 2 Ch. 416.
(2) (1878) 5 R. 770, at p. 774.
(3) (1890) 18 R. 12, at p. 19.
(4) (1895) 22 R. 740, at p. 749.

In my opinion there is no proof whatever, of a character to be safely acted upon, that the appellants ever entered into this absolute contract to sell these shares.

The respondent's repudiation of his contract to purchase these 200 shares was consequently unjustifiable, and he is therefore liable to pay to the appellants the amount of the loss so found to have been sustained.

This is not, however, the real or important point arising in the case.

The appellants, in the course of an earlier transaction, a purchase on behalf of the respondent of 100 shares of the same company, got into their possession, in the course of their business as stockbrokers and as agents of the respondent in that behalf, a transfer of those 100 shares. They claim to have a lien upon this transfer in respect of this sum of 50*l.* 2*s.* This claim is resisted by the respondent, as I understood, on two grounds: first, on the ground that a stockbroker has, in the law of Scotland, no general lien on documents such as transfers of this kind coming into his hands in the course of his business and lawfully in his custody, in respect, at all events, of debts due by a customer to him not arising out of the transaction to which the transfer relates; and second, on the ground that this transfer should have been delivered up to the respondent some days before he gave the order to buy the 200 shares ultimately resold, and that the transfer was not therefore in the appellants' lawful custody, either at the time the 200 shares were bought or at the time when the respondent repudiated his contract to purchase them.

As to the first point it is difficult to see for what reason the principle of the common law as to general lien should not apply to the case of a stockbroker.

In the case of *Fisher* v. *Smith* (1) the plaintiff, on the instruction of the agent of the owners of a ship, effected policies of insurance on her cargo. He paid the premiums, and claimed to retain the possession of the policies till the amount of those premiums and the sums due for brokerage were repaid to him. There were subsidiary points raised which need not be referred

(1) (1878) 4 App. Cas. 1.

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to; but at p. 5 of the report Lord Cairns, in giving judgment, said: "As to the question whether this is a case in which lien originally would arise in the respondent, I think there can be no doubt. He is the person who effected the policies of insurance. He either paid the premiums or became liable for the premiums, and his was the labour and the care through which the insurances were effected. According to the well-known rule of law he would be entitled, by common law, for his labour and care and his money expended, to a lien, in the nature of holding possession of the policies, and he would be entitled to that lien as against every person—against the owner of the goods for whose benefit the policies were effected, and against any intermediary who might have intervened between the owner of the goods and himself. That appears to me to be the ordinary and well-known rule of law, and I do not think it was seriously disputed at your Lordships' Bar." Every line of that extract from the judgment of Lord Cairns applies, I think, to the case of a stockbroker who buys stock for a client. And the cases of *Jones* v. *Peppercorne* (1) and *In re London and Globe Finance Corporation* (2) establish that in England as part of the law merchant, which apparently must be judicially noticed (*Brandao* v. *Barnett* (3)), bankers and brokers have a general lien on securities in their hands as between themselves and their customers for the balance due from those customers on account between them.

It will be observed that Lord Cairns says "paid the premiums or became liable for the premiums." It is therefore enough if the agent or broker has assumed liability though not discharged it. It is urged that this rule does not apply where, as here, an agent contracts for an undisclosed principal, and his liability is in effect, though not in form, only contingent on the principal's making default. It is difficult to see on what principle this distinction rests. It would appear to me to be unsound. In such a case the agent remains primarily liable on the contract to the other contracting party. He has put himself in that position in discharge of the business of his principal and as against that principal is, I think, entitled to his lien, certainly

(1) 28 L. J. (Ch.) 158. (2) [1902] 2 Ch. 416.
(3) (1846) 12 Cl. & F. 787, 805.

over documents connected with the transaction out of which the liability arose, until the principal has relieved him from the obligation under which he has put himself.

Again it is contended that documents connected with a transaction which is closed cannot be retained in respect of a liability arising out of a subsequent transaction, even though those documents happen to be in the lawful custody of the person claiming the lien at the time the subsequent transaction was entered upon, and liability of the agent incurred in respect of it. No authority was cited for this proposition. In the case of a solicitor there is admittedly no such distinction, nor, as would appear to me from the judgment of Lord Eldon in *Cowell* v. *Simpson* (1), does it exist in the case of a tradesman, or of a factor.

In the passages cited from Bell's Commentaries and Bell's Principles, principles quite in harmony with these decisions are laid down as part of the law of Scotland. I think sufficient evidence was given to shew that this general custom of the law merchant applied to transactions on the Edinburgh Stock Exchange.

The last and the most serious point on which the respondent relied is that the transfer was not in the lawful custody of the appellants when on September 1 the order was given to purchase the lot of 200 shares, inasmuch as it should have been delivered to him on August 26 or 27 though he had not demanded it, and further that, even if this were not so, the transfer was not in the lawful custody of the appellants after September 10, three days before the repudiation, when the respondent did ask for the delivery of it.

The appellants did not, in answer to this demand of September 10, refuse to deliver the transfer; on the contrary they wrote on September 11 a letter containing the following passage: "We shall be glad to see you first time you are in town when you will get the transfer for *signature*."

I do not think anything in reality turns upon this demand, since the appellants' liability for the price of this parcel of 200 shares had then accrued. But with reference to the non-delivery

(1) (1809) 16 Ves. 275.

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Lord Atkinson.

of the transfer, either on August 26 or September 10, it is necessary to consider what was the nature of the contract entered into between the appellants and respondent; what the former had bound themselves to do, and were paid to do. They were not employed merely to purchase these 100 shares and obtain a transfer of them. On the facts and documents in evidence it is plain they were employed and paid, in addition, to have the transfer registered. To do that it should be executed by the respondent and brought, or sent, to the office of the company by the appellants, and registered in the books of the company. It is to this execution of the transfer by the respondent that the appellants in their letter of September 11 refer.

Now what was the nature of the default of which the appellants are alleged to have been guilty before September 1, which, it is urged, rendered their custody of this transfer on that day unlawful? The transfer could no doubt have been delivered or tendered for signature on August 26 or 27. The reason why this was not done is stated by the witness Charles Terras Morrison in the following passage of his evidence: "In ordinary course, if the shares were coming out of our own banker's name, they should have been delivered to pursuer on the 26th or 27th. The reason why they were not was that I was working night and day, and I omitted to send the transfer to the bank for signature. I left on the 28th for a holiday, and did not get back till about the 7th of September . . . . Until the letter of the 10th of September from the pursuer, he did not intimate to us any desire to have his transfer. If he had told me before, he could have got the shares at any time, if I had been reminded of the fact that I had overlooked the matter." That evidence was uncontradicted. It is, I think, clear that the mere omission to deliver this transfer, or tender it for signature, does not, under such circumstances, make the custody of it by the broker thenceforward wrongful or unlawful as against his client, so as to deprive the broker of any lien upon it which he otherwise might have had. For these reasons I think the decision appealed from was erroneous and should be reversed, and this appeal allowed with costs.

LORD KINNEAR. My Lords, I agree entirely with the opinion which has just been delivered and I should have been content to express my concurrence without adding anything to what has been said by my noble and learned friend were it not that we are differing from the judgment of the Second Division on a question of fact; and I think it is only respectful to the opinions from which we dissent to examine in some detail the grounds of fact upon which the judgment rests.

The action is brought by the respondent, Mr. Glendinning, against Messrs. Hope & Co., who are stock and share brokers in Edinburgh, for delivery of a transfer of 100 shares of the Globe and Phœnix Gold Mining Company purchased by the defenders on his behalf. The averment is that he instructed this firm of stockbrokers to buy 100 shares for him, that they did so, and that they now refuse to deliver the transfer in his favour which is, or was when the action was brought, still in their hands. Failing delivery he demands payment of a sum of 750*l.*; but this alternative conclusion does not call for consideration since it is not disputed that the shares in question were bought for the respondent upon his order and must be delivered to him, subject only to a right of retention maintained by the defenders for payment of a debt of 50*l.* 2*s.* By a very reasonable arrangement in the course of the proceedings the transfer was in fact delivered to the respondent under reservation of all pleas, on his making a consignation of a sum of 55*l.* to cover the debt. The actual stake for which the parties are contending was thus converted into money; but their rights must be determined on exactly the same considerations as if the scrip were still in the defenders' hands and the respondent were still demanding that it should be made over to him unconditionally and without his being required to make payment of a debt which he disputes.

The first question then is whether there was a debt due by the respondent to the appellants when the action was raised; because, if not, it would be unnecessary to consider the more important question of law which is raised by the defenders' plea of right to retain. On this first question I agree with the Lord Ordinary. The respondent had instructed the appellants to buy for him

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a second parcel of 200 Globe and Phœnix shares; and the point in dispute is whether, in consequence of his refusal to carry out the purchase of this second parcel, the appellants were entitled to sell out against him and recover from him the loss which they incurred on the resale; or whether on the other hand he was not justified in putting an end to the transaction by their previous failure to do their duty as brokers.

The shares were bought in accordance with the respondent's instructions, and on September 8, which was the ticket day, the appellants passed the respondent's name to the vendors' broker for insertion in the transfer as purchaser. On September 9 they received a letter from the respondent intimating that he had resolved to resell the shares and instructing them to sell for cash and settlement on September 10; but it was impossible for them to obey these instructions and sell for cash, because when a sale is made for cash it is proved that the selling broker is required to deliver the transfer with certificate attached within twenty-four hours. This the appellants could not undertake to do, because the respondent's name had been passed to the vendors' broker and by him transmitted to Glasgow and thence to London. The appellants were therefore unable to recover the transfer in order that the name of the transferee might be altered in time for a sale for cash and settlement on September 10, and they therefore did not sell. This is supposed to justify the respondent in rescinding the contract of employment and refusing to take the shares which had been bought for him.

I am of opinion with the Lord Ordinary that the appellants are not chargeable with any failure or breach of the duty imposed upon them by their employment as brokers, and that the respondent's attempt to determine the contract was altogether without foundation. Their duty as brokers was to buy 200 shares for their customer and to take the transfer in his name. They had given no guarantee that before the transfer could be delivered the shares would at any moment be saleable for cash, and they certainly were not bound to undertake an obligation to any person who might offer to buy for cash that they would within twenty-four hours deliver to him a transfer which they knew to be at the time beyond their reach. If Mr. Glendinning had

desired to sell his shares, he might reasonably have instructed his brokers to sell for him in the ordinary course of business; but they could not be required to make a contract as brokers under conditions which it was not possible for them to carry out.

But then it is said that although it might be beyond the scope of their original employment as brokers to purchase, they made a new agreement with Mr. Glendinning to sell according to his instructions; and the learned judges have held this agreement to be proved and, further, that it involved an undertaking to sell for cash so absolute that, if the appellants were unable to recover the transfer of the shares they had bought for the respondent in time to carry out this new transaction, they were bound to find other shares that could be sold and delivered in accordance with Mr. Glendinning's instructions. They accordingly considered that Mr. Hope, the defender, was in fault because it appears that he himself had shares of his own at the time; and they held that he was bound under this new agreement to sell his own shares for cash and settlement on September 10 and to make the money forthcoming for his customer.

I must confess, with great respect for the opinions from which I differ, that I am unable to find any evidence whatever to support this theory of a new agreement. The learned judges say, and no doubt very justly, that Mr. Glendinning is a credible witness and that his evidence is sufficiently corroborated. But Mr. Glendinning does not allege that he made any new agreement whatever. He simply gave instructions which he erroneously supposed to be in ordinary course for carrying out the transaction which his brokers had already undertaken; and although it was distinctly explained to him that this could not be done in the way he desired, it did not occur to him, so far as his evidence shews, to make any proposal for a new and different transaction. His own statement indeed shews that it would have been altogether inconsistent with his main design and object to do anything of the kind. He had no real desire to sell his shares; but he wanted (so he explains) to change his stockbrokers. He was dissatisfied with Messrs. Hope & Co. because he thought that their completion of his first purchase had been unduly delayed, and accordingly he resolved to put his business

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into the hands of different brokers; but, no doubt from an amiable motive, he explains that he did not wish to disclose his feeling of distrust to Mr. Hope, and he thought that the best way of carrying out his purpose was to give an order to Messrs. Hope to sell for cash and settlement on September 10, and at the same time to give an order to another firm of brokers, Messrs. Lawrie & Ker, to attend the next day on the Exchange and buy the shares which Mr. Hope was to sell. He proposed to carry out a fictitious sale in which he should be both buyer and purchaser, for the sole purpose of getting his business out of Mr. Hope's hands. It appears to me, therefore, that to propose a new transaction to Mr. Hope with different incidents and different consequences from that which he desired to determine in so summary a way was the last thing that would have entered into his mind. He certainly, according to his own evidence, made no such proposition. He never proposed to Mr. Hope that he should sell his own shares, or that he should do anything but sell the shares which he had bought for Mr. Glendinning himself.

The learned judges express some doubt as to whether Mr. Hope had really explained, or sufficiently explained, to Mr. Glendinning that his instructions could not in fact be carried out, but I think that difficulty is quite conclusively removed by Mr. Glendinning's statement in evidence. It is said that there is some difference between the accounts which are given of an interview between the two parties, and the learned judges think Mr. Glendinning's account of the interview is preferable to the other. I confess I have no doubt that both witnesses were speaking exactly what they believed to be true. The differences are no more than are to be expected in every case where two people undertake to give an account of a conversation between them after the lapse of a considerable period; but they are both agreed upon the one point which is material to the question, namely, whether there was or whether there was not a new agreement between them, whether it was or was not explained to Mr. Glendinning that the thing he proposed could not be done, and whether he thereupon made a new agreement to have something else done. The conclusion on the whole

evidence upon this point is brought out, I think, very clearly in an answer to a question put by the Court, which Mr. Glendinning was asked: "At your interview with Mr. Hope did he say that he could arrange" (that is could arrange a sale) "or that he would try to arrange" a sale? The answer is: "It was not he who said that. He said 'Your name is passed for transfer' and indicated that the transaction could not be carried through. I said 'That can easily be arranged,' and he did not say anything after that on that point." Therefore, it appears to me to be clear that the true cause of Mr. Glendinning's somewhat precipitate action in putting an end to the contract was not that the impossibility of what he desired had not been explained to him, but that he did not understand it. He was not acquainted with the course of business on the Stock Exchange, and he did not appreciate the difficulty, which, according to his own admission, had been quite clearly explained to him. I think that throughout the whole conversation the two parties were at cross purposes, just because Mr. Glendinning had not thought fit,—for however excellent reasons,—to explain distinctly to Mr. Hope what it was that he wanted. Mr. Hope thought he wanted to sell because he said he wanted to sell for cash and immediate settlement on September 10. Mr. Hope thought that was a very inexpedient course to take and advised his client against it, telling him at the same time that it could not be done. The result upon my mind of the whole evidence is that Mr. Glendinning expected his order to be carried out because he did not appreciate the impossibility of so doing, and that Mr. Hope was left with no instructions except to sell for cash, which he knew that he could not do.

The misapprehension under which Mr. Glendinning was labouring is brought out still more clearly by his evidence as to what took place when the brokers into whose hands he wanted to transfer his business attempted to buy for cash according to his instructions. They called for shares for cash on the Edinburgh Stock Exchange on the next day. Mr. Hope made no answer to the call. Mr. Glendinning was very angry, because he said "They knew that I wanted to sell; they said they could not find buyers and when a buyer offers they take no

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notice of his call." Accordingly he says "They have wilfully disobeyed my instructions." But the reason why Mr. Hope took no notice and could take no notice of an offer to buy for cash was that he could not comply with the conditions imposed upon him if he had accepted it. His difficulty from the first was not that there were no buyers but that he had not the transfer.

I am therefore very clearly of opinion that Mr. Glendinning had no justification for the course he actually took, which was at once to intimate to Mr. Hope that there was an end of the transaction between them, that he would not take the 200 shares which Mr. Hope had bought for him, and that he would have nothing more to do with them. Mr. Hope accordingly sold out, as I think he was plainly entitled to do, according to the admitted rules of the Stock Exchange. He sustained a loss upon the sale, and he has a good right against his customer to recover payment of the difference. Mr. Glendinning, in the letter in which he refuses to have anything to do with the 200 shares, demands delivery of the transfer for the first 100. In answer Mr. Hope refuses to accept his determination of the second contract and intimates that the transfer will not be delivered until the loss which he had incurred should be repaid.

The next question is whether the appellants were entitled to retain the transfer of the first parcel of the Globe and Phœnix shares which was still in their hands until Mr. Glendinning should pay his debt of 50*l.* 2*s.* I think with the Lord Ordinary that they were so entitled.

It has been held by the learned judges of the Second Division that the evidence adduced is insufficient to establish a custom amongst stockbrokers to retain a client's uncompleted transfer in security of a general balance. I venture to think, with great deference, that the evidence is sufficient. But the right claimed for the appellants does not, in my opinion, rest upon any local custom which requires to be proved by evidence in a particular case; it rests upon the common law rule and doctrine of retention which is part of the law of mutual contract. This is defined to be a right to resist a demand for the payment of money or the

performance of an obligation until some counter obligation is paid or performed. In its simplest application the rule depends on the fundamental principle that one party to a mutual contract cannot enforce performance of its obligations in his own favour without giving or tendering performance of the obligations incumbent upon himself. Accordingly, if the appellants' counter-claim against the respondent had arisen out of the same transaction as that which brought the transfer into their hands, I apprehend that there would have been no question at all as to their right to retain. The difficulty is that the respondent's debt arose out of a subsequent contract; and it is said that there is no authority for holding that the law of Scotland recognizes a stockbroker's right of retention or lien for a general balance. It is true that there is no Scotch decision directly in point; but if the question has arisen for the first time as regards a stockbroker, it must be determined by the settled principles which have been held to govern the general class of contracts to which that between a stockbroker and his client belongs. The principle which I take to be very well settled in the law of Scotland is that every agent who is required to undertake liabilities or make payments for his principal, and who in the course of his employment comes into possession of property belonging to his principal over which he has power of control and disposal, is entitled in the first place to be indemnified for the moneys he has expended or the loss he has incurred, and in the second place to retain such properties as come into his hands in his character of agent until his claim for indemnity has been satisfied.

The most apt example of the principle is probably the case of mercantile factors and commission agents. It is held both in Scotland and in England that for the balance which may arise on his general account the factor has a right of retention or lien over all the goods and effects of the principal which, coming into his hands in his character of factor, may be in his actual or civil possession at the time when the demand against him is made. This principle is said to have been established on grounds of justice and expediency; and the conditions upon which the right depends in the case of a mercantile factor are exactly those which govern the relation of a stockbroker and

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his client. The factor's general right to retention depends upon two considerations: first, that he is required to make payments or undertake liabilities for his principal; and, secondly, that the goods and effects belonging to his principal come into his possession and control in the ordinary course of his employment. But that is exactly the position of the stockbroker who buys with a liability to pay the vendor and receives a transfer for delivery to his client.

Mr. Bell in treating of the subject remarks that the general lien or retention arises from the very nature of the contract of factory as a right resulting out of the actio contraria of the contract by which the principal engages to indemnify the agent. But that again is of the essence of the contract between the stockbroker and the client. The learned judges have held that there can be no general right of retention because the transfer which the defenders refused to part with was in their possession for the special purpose of forwarding it to the pursuer, but this appears to me to be a misconception of the true position of the legal title. If the transfer had been the respondent's property to begin with and he had deposited it with the appellants for a special purpose, it might well have been a question whether the special contract did or did not exclude the general right of retention. But the transfer never was the respondent's. He had no real right in the shares, or in the transfer that represented them, until the transfer was delivered to him in the course of these proceedings. His right as against the appellants was a right upon a personal contract only, and they had similarly upon a personal contract a counter-claim against him. It appears to me to follow from the principles which have been well established that they are entitled to set up their right to retain until his counter obligation has been duly performed. The liability was incurred, no doubt, in a different transaction, but it was one of a series of transactions in the course of which the stockbroker was employed in the same capacity to act as agent for the same purposes for their customer; and their right at the close of the connection between them is to an adjustment of accounts in which they are entitled to plead against the demand which has been made

against them their counter right of retention until their demand upon their principal has been satisfied.

I cannot say that I am moved by the consideration which had great weight with the learned judges below, that the transfer was still in Mr. Hope's hands at the time when the demand was made upon him, in consequence of his own delay in delivering it for signature to the pursuer and carrying out the transaction. The reason for the delay is to my mind quite sufficiently explained in the evidence to which my noble and learned friend has referred. But mere delay can never convert the possession which the broker had in the ordinary course of business into an unlawful possession. He was still the lawful holder of the transfer at the time when the demand for delivery was made against him.

It was said that the appellants' demand is a demand to retain for a contingent liability. I entirely agree there could be no right of retention for a contingent liability. The right to retain emerges and becomes available only when a demand is made against the person who is to plead the retention. The right became available to Mr. Hope because when he received Mr. Glendinning's demand for an immediate transfer he had already incurred the liability which entitled him to maintain his counter-claim against Mr. Glendinning.

There remains to be considered only one very technical point to which perhaps it is hardly necessary to advert, but since an argument was founded upon it I shall say a single word upon the subject. It is said that the judgment of the Lord Ordinary, to which I think we ought to return, cannot be sustained because he gives an order for payment of money to the defenders, and, according to the form of the pleadings before the Court, there was no demand for payment of money which could possibly receive effect. It is perfectly true that according to the frame of the action there could be no demand for payment made by the defenders. The action was an action for delivery of a transfer, and their answer was not an answer to a demand for payment which could be made effectual in the course of that action, but a plea of their right to retain it until payment should be made. They could make nothing out of that right of retention except through the inconvenience caused to their client by the non-delivery of

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the transfer. The effect of their right to withhold would of course be that the client must pay; but upon the form of action they had certainly no demand for payment before the Court. But then the whole nature of the proceeding was altered, and altered upon an arrangement between the parties when Mr. Glendinning for his own convenience, with the consent very properly given by the other party, consigned a sum of money in Court to await the orders of the Court. The sum of money so consigned takes the place of the transfer which was in dispute; and I apprehend there can be no question at all that when money is consigned under the order of the Court it is in the power of the Court, upon mere motion to that effect and without any new action for the purpose being brought before it, to order the sum so consigned to be paid to one or other of the parties to the consignation according as they determine the rights between them. It might be a logical technical result to hold that in point of technical form the order should not have been for payment to the defenders, but for payment to the pursuer so soon as he had paid this sum to the defenders; but there is absolutely no necessity, and I can see no ground or reason for following out any circuitous process of this kind when the Court has in the hands of its officers the sum of money which is in dispute and which by the terms of the consignation upon which it is put into Court is to remain until the order of the Court is pronounced about it.

On the whole matter, therefore, I am of opinion, with my noble and learned friend, that the interlocutor of the Second Division should be reversed and that of the Lord Ordinary restored.

LORD SHAW OF DUNFERMLINE. My Lords, the appellants are stockbrokers in Edinburgh, and in August and September, 1909, they acted as such for the respondent, their client. In the middle of August they purchased for him 100 shares of the Globe and Phœnix Gold Mining Company. On August 26, being settling day, they received payment of the price. On September 1 they purchased on his order 200 shares more, for settlement on September 10. On September 8 Mr. Glendinning

wrote to Messrs. Hope that he had decided to resell the shares, and instructed them to "sell these 200 Globes for cash and settlement on the 10th instant." On the following day he supplemented this by a letter which, inter alia, said, "I did not see my way to take up these shares." The parties had an interview, and there are certain differences between them as to what occurred; but on the same day, namely, September 9, Messrs. Hope wrote that they had been unable to sell them for cash settlement, and they added this (a passage which I think must have been overlooked by Lord Salvesen in the Court below): "Over and above this, your name was passed yesterday forenoon for the shares and cannot now be altered." It is clearly proved in the case that this in point of fact was true.

When the 10th, namely, the settling day, arrived, Mr. Glendinning did not settle; and he complained that Messrs. Hope had never offered the shares. He was at once answered on the 11th by a protesting letter repeating that no dealings could now be done for cash, "as your name had been passed the previous day and could not be altered." Mr. Glendinning declined to accept this position, and on September 13 repudiated his purchase. Messrs. Hope, the brokers, were thus in the position of being responsible for settling the price of these 200 shares, namely, 865*l.*, or doing what stockbrokers in such circumstances are entitled to do, namely, sell and charge the customer with the debit balance, if any. They did sell, and the debit balance amounts to 50*l.* 2*s.* This is the story of the 200 shares.

I desire to say that I see no occasion for doubting the honesty of either of the parties as witnesses, or for suggesting that Messrs. Hope's action deviated from the line of duty to their client, on account of Mr. Hope being also a holder of certain stock in the company in question.

In one of these letters, namely, that of September 10, Mr. Glendinning asked for the transfer of the previous lot of 100 shares, and this was obtained from the company by the brokers on the following day. The dispute as to the 200 shares was, however, then pending. Messrs. Hope were responsible on the Exchange for their price; and within two days, namely, on the 13th, Mr. Glendinning entirely repudiated the transaction,

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forcing the selling out against him as above described. In those circumstances, Messrs. Hope declined to part with the transfers until their claims against Mr. Glendinning were settled. The question is whether this action was justified.

My Lords, certain confusion has come into this case on account of allegations as to custom of trade. I am of opinion that Messrs. Hope had a right of retention, and this not on account of a custom of trade but on account of a principle in law. It cannot be justly said, although that point was taken, that Messrs. Hope were wrongfully in possession of the transfer. They came into possession of the transfer in the course of business, and I do not see in this case that there was such unreasonable delay as fairly to raise such a point. The conditions as to possession of the document seem accordingly to equate with the dictum of Professor Bell in his Commentaries: "The possession on which retention or lien depends must be actual, legitimate, and subsisting at the time when the security is claimed."

Nor can I agree with the proposition, which was so ably argued by the learned counsel for the respondent, that the transfer should have been at once transmitted for completion, for which limited purpose alone it had come into their hands, and that possession should have been parted with by the stockbroker irrespective of any debt due to him by his client. Upon this matter I venture to quote these sentences from the judgment of Buckley L.J. in the case of *The London and Globe Finance Corporation* (1): "As to the law, I do not think that there is any room for doubt. *Jones* v. *Peppercorne* (2) is a decision pronounced in the year 1858, and which has been regarded as well settling the law ever since,—to the effect that brokers and bankers have a general lien on securities in their hands as between themselves and the customer for the balance due from the customer to the broker. . . . . Here there is nothing at all to exclude the general lien, which it is not, and cannot be, disputed exists. The transactions as between the customer and the broker resulted in a sum owing by the

(1) [1902] 2 Ch. 416, 420. (2) 28 L. J. (Ch.) 158.

customer to the broker, and there were in the possession of the broker securities which had come into his hands in the course of his business as broker of the customer. It is a well-established principle that the broker has as against the customer the right to hold those securities for the amount due." My Lords, I respectfully adopt that language as my own. Further, in my opinion, the securities there mentioned include a transfer of stocks still unexecuted or only partially executed, and the principle there set forth is a principle not only of the law of England but of Scotland.

As has been seen, my Lords, the proof in this case, and particularly the terms and dates of the letters, are, in my opinion, to an effect opposite to that conceived by Lord Salvesen. I agree with the conclusion which Lord Mackenzie arrived at on that subject. And, as to the principle of law, I think Lord Mackenzie has correctly applied it; and, with much respect to the learned judges of the Second Division, I think that that principle has not been applied to this case by that Court.

My Lords, one question to which my noble and learned friend Lord Kinnear has alluded, the question of procedure in the Scotch Courts, was raised at your Lordships' Bar as to what was to happen with regard to the amount of 50*l.* 2*s.*, being the balance due to Messrs. Hope as the result of selling out against Mr. Glendinning. That sum was deposited with the accountant of the Court to await the orders of the Court. It is clear that the inquiry in this case covered not only the right to retain but the whole conduct of parties, culminating in the selling out which resulted in the debit balance. Messrs. Hope's conduct in that particular appears to me to have been justified, and, speaking for myself, it would be with the greatest reluctance that I could consent to a fresh litigation on a substantially identical issue having to be undertaken in order that Messrs. Hope might recover that money. Lord Mackenzie, I think, acted wisely in granting a warrant for payment of the consigned money to Messrs. Hope. In my opinion, the judgment of the Second Division should be reversed and that of the Lord Ordinary should be affirmed in all points. I should add that I think Lord Mackenzie's selection of the defenders' second plea

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as a ground for absolviter was also correct. In the view which I hold, the defenders were entitled to retain the scrip until payment of the debt due to them.

LORD LOREBURN L.C. My Lords, I agree with the conclusion at which your Lordships have arrived.

Ordered that the interlocutor appealed from be reversed; that the judgment of the Lord Ordinary be restored; and that the respondent do pay to the appellants their costs here and below.

Lords' Journals, June 26, 1911.

Agents for appellants: *Neish, Howell & Haldane, for W. & F. Haldane, W.S., Edinburgh.*

Agents for respondent: *G. R. Thorne, Robinson & Co., for Sharpe & Young, W.S., Edinburgh.*

[PRIVY COUNCIL.]

COMMISSIONER FOR STAMP DUTIES . . APPELLANT;

AND

BROKEN HILL SOUTH EXTENDED, LIMITED. . . . . RESPONDENTS.

J. C.* 1910 Dec. 1. 1911 May 15.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Stamp Duties Amendment Act, 1904, *s.* 14, *sub-s.* 5—*Construction — Sale Consideration partly consisting of Shares — Duty assessable on their true, not necessarily face, Value.*

On April 17, 1907, a reorganized and reconstituted company accepted (in accordance with a provisional agreement dated March 26, 1907) the transfer of the property and assets of its predecessor and authorized the issue of its own shares fully or partly paid as the consideration. The appellant, under New South Wales Stamp Duties Amendment Act, 1904, s. 14, sub-s. 5, assessed the transfer stamp duty on the value of the shares so issued, attributing to them as value the amounts reckoned as paid up:—

Held, that the Supreme Court was right in holding, on a special case, that April 17, 1907, was the date of assessment, and that the Commissioner was wrong in refusing to consider evidence tendered to shew that the amount reckoned as paid up on the said shares, though prima facie evidence of value at the date of issue, was not their real value at the date of assessment.

APPEAL against an order of the Supreme Court (July 30, 1909) upon a special case stated by the appellant under s. 18 of the Stamp Duties Act, 1898 (No. 27 of 1898), and s. 18 of the amending Act (No. 24 of 1904).

The question raised thereby was whether, when there is an agreement to sell property to a person purporting to act for a not yet existing purchasing company in consideration of shares of the purchasing company which are to be issued to the vendor, or to his nominees, as partly paid up, the ad valorem stamp duty must be taken to be assessable on the amount expressed to be paid up on the shares or on the real value of the shares.

The agreement in this case was dated March 26, 1907, and was

* *Present:* LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD GORELL, and LORD SHAW OF DUNFERMLINE.

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for the sale to the respondent company of the undertaking and assets of the New Australian Broken Hill Consols, Limited (such assets consisting principally of leases of mineral properties in New South Wales), for a consideration which included fully paid up and partly paid up shares in the respondent company; and in assessing the stamp duty on the agreement the Commissioner treated the said shares as being of the value of the respective amounts which were under the provisions of the agreement to be credited as paid up thereon respectively.

The respondent company contended before the Commissioner that in assessing the stamp duty upon the said agreement of March 26, 1907, the Commissioner should have estimated the value of the share consideration in accordance with the market value of the shares, and that such market value should be ascertained by certain evidence which the respondent company produced for the purpose of shewing that the market value of the shares was considerably less than the face value thereof.

The Commissioner, however, was of opinion that the evidence produced was not material to the question of the value of the shares at the date of the agreement of March 26, 1907, as no shares had in fact been issued nor had any sales thereof been made at that date. He could therefore only assess the value of the shares at the face value as stated in the agreement, and decided that the respondent company could not be heard to say that the shares were of any less value than that expressed on the face of the agreement and of the shares when issued. He fixed the amount at 1479*l.*, which the respondents paid under protest.

The provisions of the Stamp Duties Act of 1904 material to the case are as follows :—

By s. 1 it is provided that such Act shall be construed with the Stamp Duties Act, 1898.

By the combined operation of s. 5 and the First Schedule to the Act an agreement to sell or transfer any gold mining or mineral claim or lease is chargeable with the same ad valorem stamp duty on the amount or value of the consideration for the sale or transfer as would be chargeable on the consideration for a conveyance or transfer on sale of such claim or lease.

By s. 14 it is provided as follows :—

Sub-s. 1: "Where ad valorem duty has been paid in respect of a contract or agreement to sell, exchange, or transfer a gold mining or mineral claim or lease, or mineral conditional purchase, no conveyance or transfer executed in pursuance of such contract or agreement shall be charged with ad valorem duty or a higher duty than that payable in respect of such conveyance or transfer."

Sub-s. 2: "Where in respect of any such contract or agreement the consideration or any part of the consideration for the sale, exchange, or transfer consists of any stock or marketable security, such contract or agreement shall be charged with ad valorem duty in respect of the value of such stock or security."

Sub-s. 5: "Where such consideration or any part thereof consists of shares in a company or association formed or to be formed, the value of such shares shall be taken into account in determining such consideration, and shall be assessed by the Commissioner."

The question submitted to the Court by the special case was whether the Commissioner was right in his assessment of stamp duty at 1479*l.*

The Supreme Court answered this question in the negative and referred it to Cohen J. to assess the correct amount.

Cohen J. delivered the judgment, holding that although on March 26, 1907, no shares in the respondent company had been issued, the value of the shares at that date must be looked at; that the Commissioner was wrong in taking the face value as being the value of the shares for the purpose of the assessment. Though there might be some difficulty in assessing the value of the shares, the Commissioner should have done the best he could, and was wrong in refusing to consider the evidence which was produced to him. The judgment concluded: "I do not decide that as to the amount he is wrong, but do decide that he proceeded upon a wrong principle, and that he did not give a proper construction to the Act, and therefore he is not right in his assessment."

Upjohn, K.C., and *Austen-Cartmell*, for the appellant, contended that his assessment should be confirmed. He was bound in

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deciding as to the amount of consideration upon which stamp duty was chargeable in respect of the sale agreement in question to take the amounts which according to its provisions were to be credited as paid up as being the value of such part of the consideration as consisted of shares in the respondent company. To assess the value of the shares at less than the face value would mean that the respondents had issued or intended to issue their shares at a discount, and the appellant was right in holding that the respondents were precluded from raising that contention. Reference was made to *Ooregum Gold Mining Co. of India* v. *Roper*. (1)

Danckwerts, K.C., and *J. B. Matthews*, for the respondents, contended that according to the true construction of the Stamp Duties Acts (see especially the Act of 1904, ss. 5, 14, and 18 and the schedule) the ad valorem duty was assessable on the true value of the shares at the date of the transaction and not on the sum expressed to be paid up thereon. The Crown and the subject would equally have the right to tender evidence to shew that the actual value of the shares was either greater or less than the face value. The Commissioner was wrong in excluding evidence adduced by the respondents to shew the actual value, and he proceeded upon a wrong principle in holding that as the shares had not been issued at the date of agreement he must hold that their face value when issued must be taken to be their actual value. Reference was made to *West London Syndicate* v. *Inland Revenue Commissioners* (2); *Adams* v. *Morgan* (3); *Kelner* v. *Baxter* (4); *Great Western Ry. Co.* v. *Commissioners of Inland Revenue* (5); *John Foster & Sons* v. *Commissioners of Inland Revenue*. (6)

Upjohn, K.C., in reply.

1911 — *May* 15.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal by the Commissioner of Stamp Duties for the State of New South Wales from an order pronounced by the Supreme Court of that State on a

(1) [1892] A. C. 125.
(2) [1898] 2 Q. B. 507.
(3) (1882) 12 L. R. Ir. 1, 10.
(4) (1866) L. R. 2 C. P. 174.
(5) [1894] 1 Q. B. 507.
(6) [1894] 1 Q. B. 516.

question submitted in a special case for the consideration of the Court.

The special case was stated by the Commissioner at the request of the respondents, the Broken Hill South Extended, Limited, who were dissatisfied with his assessment of the duty payable in respect of the transfer to them of the property and assets of the New Australian Broken Hill Consols, Limited, a company then in progress towards liquidation.

The two companies may be conveniently referred to as the new company and the old company. Both companies, though formed for the purpose of developing and working mineral property in New South Wales, were incorporated in England as companies limited by shares under the Companies Acts, 1862 to 1890—the old company in 1896 and the new company in 1907.

The old company was registered with a capital of 600,000*l.* divided into 600,000 shares of 1*l.* each. In July, 1905, its capital was increased to 630,000*l.* by the creation of 600,000 preference shares of 1*s.* each, conferring on the holders the whole profits of each year until the sum of 5*s.* should have been paid in respect of each preference share which would then be deemed to have been paid off.

Of the capital of the old company so increased, 596,419 ordinary shares and 150,000 preference shares were issued. All these shares were fully paid or credited as fully paid.

In the early part of the year 1907 the directors of the old company were in need of funds to enable them to develop their property, which then included a recently acquired mineral lease from which good returns were expected. At the same time they found themselves hampered in their efforts to raise money in consequence of the rights attached to the preference shares of 1905. In these circumstances they considered that the most advantageous plan would be to reorganize or reconstitute the company. Accordingly they proposed to promote a new company with a capital divided into shares of 10*s.* each to take over the property and assets of the old company.

The substance of the proposed scheme was this: (1.) the new company was to acquire the preference shares in the old

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company by allotting to the registered holders thereof one fully-paid share in exchange for every two fully-paid preference shares in accordance with the terms of a provisional agreement expressed to be made between a nominee on behalf of the preference shareholders and a person purporting to act on behalf of the new company; (2.) the new company was to purchase from the old company all its property and assets for a share consideration of (*a*) 600,000 shares credited with 8*s*. 6*d*. paid up on each share, and (*b*) so many fully-paid shares as would be equal to half the number of preference shares in the old company not exchanged under the provisional agreement above mentioned, and for the further consideration that the new company should undertake all the liabilities of the old company, including the costs, charges, and expenses of its liquidation; (3.) the shares received from the new company were to be offered for distribution among the shareholders of the old company at the rate of one share of the new company (8*s*. 6*d*. paid) for each ordinary share of the old company, and one share fully paid for each two preference shares of the old company; and (4.) if any members of the old company should not accept their due proportion of the share consideration, the old company was to use its best endeavours to dispose of the same and to distribute the net proceeds among such members according to their rights and interests in the old company.

The directors of the old company submitted the proposed scheme to their shareholders with a notice of an extraordinary general meeting to be held for the purpose of considering it, and, if thought fit, passing a resolution approving thereof, with the necessary consequential directions. These documents were accompanied by a circular letter issued by order of the board, in which it was stated that if the resolutions mentioned in the accompanying notice were duly passed, and the proposed scheme received the sanction of shareholders, the directors believed that the whole of the capital would be subscribed for, and that this would ensure sufficient funds for development of mining operations on an extended scale, and the erection of the necessary machinery. And then followed this passage: "From the general manager's report to the 30th June last, which is

enclosed, with further details of mining operations, since that date, together with plan of property, you will observe that he expresses the opinion 'that there is no doubt this mine will also soon reach the productive stage and thus justify the confidence placed in it.'"

The provisional agreement with the preference shareholders in the old company referred to in the proposed scheme was dated March 5, 1907. It was sanctioned by a resolution passed at a meeting of preference shareholders held on the 22nd of that month, by which all the preference shareholders were bound.

On March 26, 1907, the directors of the old company, in pursuance of the authority of an extraordinary general meeting held on March 25, caused the seal of the old company to be affixed to a provisional agreement embodying the terms of the proposed scheme.

On April 5, 1907, the new company was incorporated and the directors of the old company became directors of the new. As such directors in execution of the trust which they had undertaken on behalf of the new company they approved the proposed scheme, and on April 17, 1907, they caused the seal of the new company to be affixed to two agreements of that date by which the new company adopted the two provisional agreements of March 5 and 26, 1907. April 17, 1907, is therefore the date on which the agreement for the transfer of the property and assets of the old company became binding on the new company, and the date to be looked to for the purpose of assessing stamp duty.

Stamp duties on agreements for the transfer of property in New South Wales are regulated by the Stamp Duties Act, 1898 (No. 27 of 1898), and the Stamp Duties Amendment Act, 1904 (No. 24 of 1904). The duty is 10*s.* per cent. where the amount or value of the consideration exceeds 100*l.* There are sections in the Stamp Duty Code dealing with special cases where part of the consideration consists of stock or shares of a company "formed or to be formed." But it may be doubted whether any of those sections applies to a case where a company limited by shares purchases property by issuing its own shares fully or partly paid as the consideration or part of the consideration for the purchase, inasmuch as no share in a limited

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company can legally be issued as fully or partly paid except for payment in money or money's worth. The provision intended to have effect where the consideration consists of shares in a company "to be formed" certainly cannot apply to such a case as this, because, of course, no company can enter into a contract before it is formed or even ratify a contract purporting to be made on its behalf before its formation. The point is not of any practical consequence because in any case the enactment assumed to be applicable (sub-s. 5 of s. 14 of the Act of 1904) directs that the value of the shares forming the consideration or part of the consideration shall be taken into account in determining the consideration, and shall be assessed by the Commissioner. Practically it comes to the same thing whether that sub-section is or is not applicable in the present case.

Treating the case (as their Lordships for the purpose of argument propose to treat it) as falling under s. 14, sub-s. 5, of the Act of 1904, the Commissioner assessed the value of the 10*s.* shares forming part of the consideration for the transfer at 10*s.* each where issued as fully paid, and at 8*s.* 6*d.* where issued as paid up to the extent of 8*s.* 6*d.*

Considering the share consideration to be of that value the Commissioner assessed the duty payable at 1479*l.* The new company being dissatisfied with his assessment appealed to the Supreme Court, and, as they were entitled to do, they required the Commissioner to state a case for the purpose of the appeal. The question proposed for the decision of the Court was whether the Commissioner was right in his assessment, and if he was not right, what was the correct amount of duty to be paid on the agreement of transfer. The judgment of the Supreme Court was delivered by Cohen J. with the concurrence of the other members of the Court. Cohen J. held that the Commissioner was wrong in refusing to consider certain evidence tendered on the part of the new company with the view of shewing that the amount reckoned as paid up on the shares in the new company, though approved by the promoters and directors of the new company in their fiduciary capacity and adopted by the new company under their common seal as part of the consideration for the proposed transfer, was or might be open to reconsideration,

"I am of opinion, therefore," says the learned judge, "that the Commissioner was wrong in refusing to consider the evidence to which I have referred, and the question submitted in the special case must be answered in the negative." "I do not decide," he adds, "as to the amount he is wrong, but do decide that he proceeded on a wrong principle, and that he did not give a proper construction to the Act, and therefore he is not right in his assessment." The question submitted by the special case being answered in the negative, the Court referred it to Cohen J., sitting as the Court under statutory authority to assess the stamp duty.

In dealing with this appeal it seems to be of some importance to bear in mind the exact point determined by the Supreme Court. That Court did not determine (as the respondents erroneously allege in paragraph 11 of their printed case) that it was the duty of the Commissioner "to ascertain the real saleable or marketable value of the shares issued by the respondent company," and to assess the duty on that value. It did not determine the amount of the duty payable, nor indeed was any opinion on that point intimated except so far as an intimation of opinion may be gathered from a passage in the judgment of Cohen J. in which that learned judge, after having stated that the Commissioner refused to receive the evidence tendered by the new company, observes that if he had considered that evidence he might very well have said that the quotations tendered as evidence of value were so far distant in point of time from the date he had to direct his attention to that he could not give any effect to them, and then the learned judge adds: "all the expense of this appeal would have been avoided if he had taken the course of receiving the evidence and applying his mind to it, and then assessing the value according to his own judgment." The only point decided by the Supreme Court was that the Commissioner was wrong in point of law in excluding summarily evidence tendered for the purpose of contradicting what was prima facie evidence of the value at the time of issue. It was, of course, the duty of the directors of the new company to satisfy themselves that the value put upon the property of the old company, which was to be assigned to the new company, was a fair value, and not the less so because they were themselves

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promoters of the new company and directors of the old. Notwithstanding a very singular declaration by the company's secretary, there is not sufficient evidence to prove that the directors of the new company were guilty of a misfeasance which, on the authority of *Hirsche* v. *Sims* (1), would subject them to a heavy liability, at any rate, in the case of the shares which were not taken up by the shareholders in the old company and were sold in the market as paid up to the extent of 8*s.* 6*d.* each. Still, if under s. 14, sub-s. 5, of the Act of 1904 it was the duty of the Commissioner to assess the value of the share consideration, it cannot be contended that the action of the company in issuing the shares as fully or partly paid operated as an estoppel when the question came before the Commissioner. Assuming that the directors acted in perfect good faith, it is quite conceivable that there might be evidence to shew that the value attributed to the share consideration by the new company was not the real value, as, for instance, if it appeared that the old company had no title to one of the mineral properties on which the estimate of value was, or ought to have been, based. Their Lordships, therefore, think that it is impossible to hold that the learned judges of the Supreme Court were wrong in thinking that the Commissioner ought to have received and considered the evidence tendered by the respondents. Their Lordships also think the Commissioner was in error in taking, as he did, March 26, 1907, as the date on which the value of the share consideration was to be assessed. At that date the new company was not in existence. It is obvious that shares which a company not in existence may or may not be in a position to issue, if it ever does come into existence, can have no assessable value. The true date is the date when the new company adopted the provisional agreement of March 26, 1907, and bound itself to issue its shares representing them to be of the value of 10*s.* when issued as fully paid, and of the value of 8*s.* 6*d.* when issued as paid up to that extent. That date was April 17. Possibly, if the true date had been kept in view, the difficulty, such as it is, which has given rise to this question would not have presented itself, and probably no difficulty would have occurred to anybody

(1) [1894] A. C. 654.

if the agreement between the two companies had been in a form which is not uncommon, namely, in the form of an agreement to the effect that the purchasing company should buy the property and assets of the selling company for so much cash (292,420*l.* in the present case), to be satisfied as to so much by the issue of shares fully paid, and as to so much by the issue of shares partly paid up. That is the real contract written large and stated fully and truly as required by s. 2, sub-s. 14, of the Act of 1904.

It will be for the learned judge to whom the question was referred by the Supreme Court to assess the amount of stamp duty payable. Their Lordships therefore abstain from expressing a final opinion on that question. The learned judge (if he thinks s. 14, sub-s. 5, of the Act of 1904 applicable) will no doubt consider whether the market price of the shares of the old company can have any bearing on the question before the Court. The directors of the old company probably were aware of the market price of the shares of the old company when they issued the circular letter of March 14, 1907, which was intended to create a hopeful view of the situation grounded in some measure on a report by their general manager, not easily reconcilable with the declaration submitted by him to the Commissioner. The shares in the new company which were sold in the London stock market in and after July, 1907, seem to be the 96,242 shares which were not applied for by members of the old company, and which were apparently thrown upon the market without any prospectus or anything to recommend them or explain their issue. Whether a question which it was the duty of the directors to determine, as at a given date, can be affected by subsequent transactions on the London Stock Exchange, and, if so, to what extent, is again a question to be determined by the learned judge to whom the matter was referred.

In the result their Lordships think there is no ground for disturbing the judgment appealed from, and they will humbly advise His Majesty that the appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *Light & Fulton.*
Solicitors for responden : *H. C. Barker & Son.*

[PRIVY COUNCIL.]

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March 16; *May* 4.

CORNELIS GIDEON DE JAGER AND OTHERS. PLAINTIFFS;

AND

JAMES ALEXANDER FOSTER AND OTHERS. DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Law of Cape Colony—Mutual Will—Construction of Codicil—Gift to the two Sons, with a Fidei Commissum in favour of their eldest Sons—Fidei Commissum not to be extended beyond what was clearly expressed—Gift to the eldest Grandsons absolute.

It having been decided that on the true construction of a codicil in 1822 to a mutual will by husband and wife in 1812 the two sons of the testators were joint fiduciary heirs in equal shares of the property bequeathed, and that each of them was burdened with a fidei commissum in favour of his eldest son and no others:—

Held, in further litigation after the deaths of their two sons, that the logical result of that decision was that each of the two eldest grandsons became on the death of his father the full and absolute owner of his father's half share free from any further fidei commissum and with power to alienate, there being nothing in the codicil to indicate that on the death of the grandsons the property should revert to the heirs ab intestato of the testators.

De Jager v. *De Jager*, (1886) 11 App. Cas. 411, followed.

APPEAL from a judgment of the Supreme Court (September 14, 1909) affirming a judgment of the Circuit Court for the district of Oudtshoorn (March 31, 1909).

The appellants are descendants of one Carel Johannes de Jager and of his wife Susanna de Jager, and the respondents are the executors testamentary of the estate of Carel Johannes Cornelis de Jager, senior, a grandson of the said Carel Johannes and Susanna de Jager.

The action was brought for a declaration that the appellants are each entitled to a certain share in the farm known as Buffelsdrift in the division of Oudtshoorn, Cape Colony, under a codicil to the joint will of the said Carel Johannes and Susanna de Jager,

* *Present:* LORD MACNAGHTEN, LORD GORELL, LORD ROBSON, and SIR ARTHUR WILSON.

who were married in community of property on September 22, 1812. The testators executed two codicils, one in 1820 and the other in 1822.

The main issue was whether under the true construction of the codicil of 1822, which is set out in their Lordships' judgment, the said Carel Johannes Cornelis took an absolute estate in the farm of Buffelsdrift, or whether he took only a life interest therein with remainder to the grandchildren of the original testators or their descendants by representation.

The said codicil has been the subject during the last thirty-five years of much litigation, which is detailed in the judgment of their Lordships. The cases are reported in *De Jager* v. *Scheepers* (1), *De Jager* v. *De Jager* (2), and *De Jager* v. *Estate of De Jager* (3); the result of them being to establish the true construction of the codicil in the following points:—

(1.) That the two sons of the original testators were joint fiduciary heirs in equal shares of the said property bequeathed, and that each of them was burdened with a fidei commissum in favour of his eldest son and no others, and

(2.) That it was not intended by the said testators to burden the said shares in the hands of their grandsons with any further fidei commissum.

The question which remained undecided thereby and raised in this appeal was whether the two grandsons of the original testators, namely, Carolus Johannes Petrus and Carel Johannes Cornelius (senior), became on their respective fathers' deaths, as the respondents contended, the full and absolute owners of their respective shares of the property; or whether, as contended by the appellants, their shares were on their deaths intended by the original testators to revert to and be divided in equal shares among all their grandchildren, and other remoter heirs.

Briefly the appellants contended that from the words of the will and codicil it was clearly indicated that the codicil was

(1) Buchanan's Cape S. C. R., 1875, p. 86, and (1880) Foord's S. C. R. 120.

(2) (1884) 1 Buchanan's Cape Appeal Court Cases, 429; S. C. 11 App. Cas. 411.

(3) (1908) 25 Cape S. C. R. 703.

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added expressly to benefit the grandchildren, and shewed an intention of division between all of them, imposing limitations on the absolute right given to the children by the will. The respondents contended that the two eldest grandsons of the original testators became each entitled on the death of his father to the absolute ownership of a one-half share in the property bequeathed by the said codicil free and unincumbered by any fidei commissum.

The Supreme Court held that the Circuit Court in deciding that the two grandsons upon taking the fidei commissary bequest became entitled to the land in full ownership had given logical effect to the previous decisions in regard to the construction of the said codicil. It further held that the prohibition against alienation did not transform the interest conferred upon the grandsons into a bare usufructuary interest, and that the two eldest grandsons became legally entitled to the full ownership of the said property with power to alienate; and that there was nothing in the codicil to indicate that on the death of the grandsons the property should revert to the heirs ab intestato of the testators: see *De Jager* v. *De Jager*. (1)

Sir R. Finlay, K.C., and *E. Charles*, for the appellants, contended that on a consideration of all the expressions used in the codicil, and with a view to give an intelligible meaning of the whole of it, it resulted that the eldest son of the grandchildren was intended by the testators to take the same proprietary right as the children, namely, a life interest. It was intended that the eldest grandson should enjoy the land for life before the other grandchildren could touch it, and that on his death it should revert to the heirs of the testators, namely, all the grandchildren. The Court was wrong in holding that because it had been already decided that there was no fidei commissum extending to the eldest sons of the grandsons it therefore followed that the grandsons obtained full ownership. They cited *Strickland* v. *Strickland* (2), as to fidei commissum, and the previous decisions upon this codicil in *De Jager* v. *Scheepers* (3),

(1) 11 App. Cas. 411. (2) [1908] A. C. 551.
(3) (1875) Buch. Cape S. C. R. 86.

De Jager v. *Scheepers* (1), *De Jager* v. *De Jager* (2), and *De Jager* v. *Estate of De Jager*. (3)

Buckmaster, *K.C.*, and *Mackarness*, for the respondents, contended that on the true construction of the codicil the fidei commissum imposed upon the two sons in favour of their eldest sons respectively extended no further than was expressed; and that each of the eldest grandsons took absolutely. It was a principle of construction in the law of the Cape Colony that in the absence of a clear indication of intention the imposition of a fidei commissum was not to be recognized, and that it should not be presumed that testators intended such a burden unless expressed in clear language. The prohibition against alienation inter vivos of the property by the fiduciary legatees did not have the effect in law of restricting the power of the eldest grandsons to dispose of the property inter vivos or by will. Reference was made to *Castleman* v. *Stride's Executor* (4); Maasdorp's Inst. of Cape Law, bk. 1, p. 157; *Drew* v. *Executors of Drew*. (5) Moreover it has been held in 11 App. Cas. 411 that under this codicil the two eldest grandsons took their respective fathers' shares to the exclusion of any right or share claimable by the other grandchildren.

Sir R. Finlay, *K.C.*, in reply.

1911 *May* 4.

The judgment of their Lordships was delivered by

LORD GORELL. This is an appeal from a judgment of the Supreme Court of the Colony of the Cape of Good Hope (sitting as a Court of Appeal), consisting of Lord De Villiers C.J. and Laurence and Hopley JJ., dated September 14, 1909, dismissing with costs an appeal from a judgment of Buchanan J., the presiding judge of the Circuit Court for the district of Oudtshoorn in the said Colony, dated March 31, 1909.

The action in the said Circuit Court was begun by summons on March 11, 1909, and the questions in dispute depended upon the construction of a codicil to a certain mutual will. The said

(1) Foord's Rep. (S. C. R.) 120.
(2) 1 Buch. App. Cas. 429; S. C. 11 App Cas. 411.
(3) (1908) 25 S. C. R. 703 and 3 Buch. App. Cas. 347.
(4) (1885) 4 Juta, 28.
(5) (1876) 6 Buch. S. C. R. 203.

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will was executed in the Dutch language on September 22, 1812, by one Carel Johannes de Jager, and his wife Susanna de Jager, to whom he was married in community of property. The said codicil was executed on July 19, 1822.

With regard to the will, it is sufficient for present purposes to state that under it the first dying of the testators appointed the survivor as heir to the whole estate of the first dying, on condition that the survivor should be obliged to bring up the children in a proper manner until their majority, marriage, or other approved state, upon the happening of which event they were to be paid such amount as the survivor found to be due to them. They further declared that their farm named Buffel River, likewise their slaves, should after the death of the survivor be sold privately among their children collectively.

The testators on April 4, 1820, executed a first codicil, and on July 19, 1822, they executed the further codicil upon the construction of which the questions in dispute depend.

The further codicil, as translated in the annexure to the writ of summons, is in the following terms:—"We, the undersigned testators of the above, our testament and last will, having taken into consideration that it would be useful and necessary for our surviving children and grandchildren to add the following to this our testament:—

"We desire expressly and bequeath by these presents to our two children procreated in wedlock, named Gideon Carolus Johannes de Jager, and Johannes Stephanus de Jager, our dwelling place named the Buffel River, situate on the Oliphants River, under the district of George, together with a certain piece of ground situate on the lower side of the dwelling place before mentioned, and also adjacent thereto (now also surveyed), with this understanding, however, that our two above-mentioned children may not sell the same, exchange, or pledge, or do anything of a similar nature, and that always this above-mentioned bequest of our dwelling place, together with the adjoining piece of quit rent land, shall remain in the first place for both of them; in the second place the eldest son of our grandchildren shall always have the same right thereto, and after the decease of their parents remain in possession thereof,

with this understanding, however, that the other heirs who may still be born shall enjoy equal share and right thereto. Wishing and desiring, we, the testators, this only to be our object not to let the before-mentioned bequest fall into other hands but to be for the convenience and benefit of our two children and grandchildren, so that always the eldest son of our grandchildren has the privilege. And since the place is provided with a strong and flowing water and sufficient serviceable ground, the grandchildren can, in our opinion, if God grants His blessing, earn their living thereon."

The testator and the testatrix died in the year 1825 without having executed any other will or codicil, leaving two sons, Gideon Carolus Johannes and Johannes Stephanus, and one grandchild, Carolus Johannes Petrus, son of the eldest son and born in 1821. Other grandchildren were born subsequently to the death of the testators. The children, grandchildren, and descendants are shewn in a genealogical table in the appellants' case.

The questions to be decided in this appeal are whether the judgment under appeal should be affirmed, or whether, as contended by the appellants, the property bequeathed by the said codicil passed in proportionate shares to all the appellants by virtue of their being either grandchildren or great grandchildren or heirs ab intestato of the said testators; or, in the alternative, whether it passed to the first plaintiff, Cornelius Gideon de Jager, by virtue of his being the next brother of the said Carel Johannes Cornelius (senior) and therefore, on the latter's decease, the eldest grandson of the original testators. Both the Courts below decided against the plaintiffs' claims.

During the last thirty-five years the further codicil of 1822 has been the subject of much litigation in the Cape Courts.

In 1875 Johannes Stephanus de Jager, the second son of the original testators, sued the executor and two sons of his elder brother Gideon (who died in 1860), claiming that on the death of Gideon he became entitled, by virtue of the jus accrescendi, to the usufruct for life of the whole property bequeathed by the said codicil, with remainder over to the eldest living grandson of the original testators. The Supreme Court of the Cape

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decided against this contention and held that on the death of each son of the original testators his half of the said property went to his eldest son. The said Court also took the view that the following words used in the said codicil, that is to say, "other heirs who may still be born," were intended by the testators to apply to other children who might be born subsequently to them, the testators, and not to possible grandchildren or other remoter descendants.

In 1877 Carel Johannes Cornelius de Jager, the eldest son of Johannes Stephanus (who died in 1876), instituted an action to eject Carolus Johannes Petrus from the share of the farm which he, as eldest son of Gideon Carolus Johannes (the eldest son of the testators), in 1860 had inherited under the codicil. The action was based on a notarial deed of purchase and sale, and a decision was given in favour of the defendant. The plaintiff obtained leave to appeal to this Board, but before that appeal was prosecuted the parties entered into an agreement on August 5, 1879, embodied in a consent paper in terms of which the Court on August 7, 1879, granted an order amending the previous judgment to accord with the consent paper. The main alteration was that the plaintiff agreed, instead of 3000*l.*, to pay the sum of 7500*l.* for that share of the farm of which he already held transfer.

In the year 1880 the said Carel Johannes Cornelius de Jager brought an action of ejectment against one Scheepers and others, who were in occupation of a portion of the share of the said property which had been bequeathed to Gideon Carolus Johannes, claiming that he had become by purchase from Carolus Johannes Petrus (the son of the said Gideon) owner of his share of the said property. It was held by the Court that the plaintiff was entitled to recover the land from the defendants as having received transfer of it in 1877 by virtue of a purchase from the said Carolus, son of Gideon, of his share of the said property.

There was still further litigation in the year 1884, and an appeal was brought in that case to this Board. (1)

In that case the plaintiffs were two younger children of the said Johannes Stephanus, the younger son of the original

(1) 11 App. Cas. 411.

testators, who alleged that the defendant, their eldest brother, had no right or title to the whole of their father's share in the said property, and they claimed to be themselves entitled, as grandchildren of the original testators, to an equal share with the defendant and other grandchildren in the said property. The suit began in the Circuit Court of Oudtshoorn and went on appeal to the Cape Supreme Court. Both Courts decided against the plaintiffs. Both Courts held that the following words in the said codicil, that is to say, "the eldest son of our grandchildren," should be construed as meaning "the eldest son among our grandchildren," in other words, the eldest son of each of the sons of the original testators. Both Courts affirmed the construction already put upon the words "with this understanding, however, that the other heirs who may still be born shall have equal share therein and right thereto," and held that "other heirs" had reference to other children who might subsequently be born to the original testators. In the appeal of the plaintiffs to the Judicial Committee of the Privy Council it was held, affirming the Courts below, that the defendant and respondent, Carel Johannes Cornelis de Jager, as the eldest of his father's children, was entitled to the whole of his father's share in the said property. The question whether there was a fidei commissum or entail in favour of the respondent's eldest son or in perpetuity was expressly left open by the Judicial Committee as well as by the Courts below. In argument for the appellants on the present appeal it was urged that in the case just stated the codicil was treated as having been made at a time when they had no grandson living, whereas in fact Carolus Johannes Petrus was born in the year preceding that in which the codicil was made.

In the year 1908 an action was brought in the Supreme Court of the Cape Colony by Nicholaas Johannes and his eldest son, Carolus Petrus Johannes, being respectively the great grandson and great great grandson of the original testators through their eldest son Gideon, against the executors (the present respondents) of Carel Johannes Cornelius (senior), who died in 1903, claiming that Nicholaas Johannes was entitled by virtue of the fidei commissum imposed upon his grandfather, the said Gideon, to the half share of the said property left to his said grandfather,

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subject to a further fidei commissum in favour of his said son the second plaintiff. An important question in this case was whether the Dutch word "kindskinderen" in the said codicil ought to be translated by the English word "grandchildren" or by the English word "descendants." It was held by Buchanan J., who tried the case in the Divisional Court, that the Dutch word signified "grandchildren," and that consequently no rights devolved upon either of the plaintiffs by virtue of the said fidei commissum, and he gave judgment for the defendants. An appeal was taken to the Full Supreme Court, sitting as a Court of Appeal, and was heard by De Villiers C.J., Laurence and Maasdorp JJ., who confirmed the judgment and dismissed the appeal. The case in the Divisional Court is reported as *De Jager* v. *The Estate of De Jager* in 25 Cape Supreme Court Reports, p. 703, and the appeal is reported under the same title in 3 Buchanan's Appeal Cases, p. 347, and 19 Cape Times Reports, p. 81. From this judgment an appeal to the Judicial Committee of the Privy Council was noted but has since lapsed for failure of prosecution.

These decisions appear to have established that the two sons of the original testators were joint fiduciary heirs in equal shares of the said property bequeathed, and that each of them was burdened with a fidei commissum in favour of his eldest son and no others, and that it was not intended by the said testators to burden the said shares in the hands of their grandsons with any further fidei commissum.

The question raised in this appeal is whether the two grandsons of the original testators, namely, Carolus Johannes Petrus and Carel Johannes Cornelius (senior), became on their respective fathers' deaths, as the respondents herein contend, the full and absolute owners of their respective shares of the said property, or whether on their deaths, as contended by the appellants, the said shares were intended by the original testators to revert to and be divided in equal shares among all their grandchildren and other remoter heirs.

The six plaintiffs in the action in which this appeal has been brought are Cornelis Gideon and three sisters, being respectively the next brother and certain sisters of the said Carel Johannes Cornelius, the eldest son of the testators' second son Johannes

Stephanus. The fifth plaintiff, Cornelius Jacobus Hermanus Mostert, is the husband married in community of property to the late Anna Catharina Magdalena Mostert, who was born de Jager, and was the daughter of Petrus Jacobus Johannes, the second son of Gideon Carolus and therefore grandson of the original testators. The sixth plaintiff is Nicholaas Johannes Petrus de Jager, the son of Carolus Johannes Petrus, the eldest son of the said Gideon, and therefore great grandson of the original testators. The plaintiffs therefore consist of a grandson and three granddaughters of the original testators, the husband of a great granddaughter, and a great grandson.

By the amended writ of summons the plaintiffs allege that upon the deaths of the two grandsons of the original testators, to wit, Carolus Johannes Petrus and Carel Johannes Cornelius (senior), all right and title enjoyed by the said two grandsons in the property bequeathed by the said codicil reverted to the heirs of the original testators, and that as such heirs, or claiming through such heirs, the plaintiffs are entitled to claim as against the respondents, the executors of the late Carel Johannes Cornelius (senior), shares in the said property in the proportions set forth in the said summons. They contend that according to the correct interpretation of the codicil, and in order to carry out the intention of the testators therein expressed, on the death of Carel Johannes Cornelis, the eldest son of Johannes Stephanus, and grandson of the original testator, the farm of Buffelsdrift ought to be divided up among all the grandchildren of the original testators, or their representatives, in such a proportion that the children of Gideon Carolus Johannes divide his half share equally, and the children of Johannes Stephanus divide his half share equally, the children of any deceased child taking their deceased parent's share by representation.

An alternative claim is made on behalf of the first plaintiff, Cornelis Gideon, that by the death of his elder brother he became the eldest surviving grandson, through his father Johannes Stephanus, of the original testators, and as such is entitled to the same right and share in the said property as was enjoyed by his father under the said codicil.

The broad contention of the respondents (defendants) is that

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upon a true construction of the said will and codicil the said Carolus Johannes Petrus and Carel Johannes Cornelis (senior), the eldest grandsons of the original testators, became each entitled on the death of his father to the absolute ownership of a one-half share in the property bequeathed by the said codicil, free and unincumbered by any fidei commissum, and that by the aforesaid notarial deed of sale, to which the plaintiff Nicholaas Johannes was a party, the said Carolus Johannes Petrus sold his share of the said property to his cousin the said Carel Johannes Cornelis (senior), and that thereafter, in consequence of the legal proceedings in 1877-79 and the compromise sanctioned by the Court, the latter became the absolute owner of the said share, as well as of his own, and being the absolute owner of the said property had disposed of it by will as he was entitled to, and that they as his legal representatives were administering the estate in accordance with the provisions of the said will.

The case was heard by Buchanan J., who on March 31, 1909, gave judgment for the defendants with costs. From this judgment the appellants (plaintiffs) appealed to the Supreme Court of the Colony, and on September 14, 1909, the Court dismissed the appeal with costs.

The judgment of the Court was delivered by the Chief Justice, to whom the codicil had become familiar in consequence of being before him in some of the previous cases. He held that the Circuit Court, in deciding that the two grandsons upon taking the fidei commissary bequest became entitled to the land in full ownership, had given logical effect to the previous decisions in regard to the constructions of the codicil. He further held that the prohibition against alienation did not transform the interest conferred upon the grandsons into a bare usufructuary interest, and that the two eldest grandsons became legally entitled to the full ownership of the said property with power to alienate. He added that there was nothing in the said codicil to indicate that on the death of the grandsons the said property should revert to the heirs ab intestato of the testators, and he cited the decision of the Judicial Committee in *De Jager* v. *De Jager* (1) as confirming this view.

(1) 11 App. Cas. 411.

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The judgment was concurred in by Laurence and Hopley JJ.

The case appears to have been fully considered in the Courts below. It has been ably and fully argued before their Lordships, to whose attention all the facts as now presented have been drawn. Their Lordships do not think it necessary to say more than that they entertain the same opinion of the case as that expressed by the Chief Justice, and that the appellants have failed to shew any grounds for disturbing the judgment appealed from.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal. The appellants must pay the costs.

Solicitors for appellants: *Biddle, Thorne, Welsford & Sidgwick.*

Solicitor for respondents: *James Reynolds.*

[PRIVY COUNCIL.]

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March 23, 24, 25; *May* 10.

CANADIAN PACIFIC RAILWAY COMPANY . PLAINTIFFS;

AND

CORPORATION OF CITY OF TORONTO AND GRAND TRUNK RAILWAY COMPANY OF CANADA . . . . . } DEFENDANTS.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF CANADA AND THE COURT OF APPEAL FOR ONTARIO.

Canadian Railway Act, 1906, *s.* 2, *sub-s.* 11, *and s.* 2, *sub-s.* 28; *s.* 56, *sub-ss.* 2, 3, *and* 9; *s.* 238—*Powers of the Railway Board—Highway—Construction—Canadian Act* 56 *Vict. c.* 48—*Special Act—Prerogative Right to grant Special Leave to Appeal.*

The Railway Committee of the Privy Council of Canada in the exercise of powers preserved to it under s. 238 of the Canadian Railway Act, R. S. C., 1906, c. 37, on January 14, 1904, ordered the appellant

Present: LORD LOREBURN L.C., LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD ROBSON.

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and respondent railway companies to carry a bridge over their respective lines at Yonge Street in the city of Toronto.

The Railway Board constituted by the Railway Act of 1903, consolidated in 1906, on June 9, 1909, ordered the said two companies to construct an elevated viaduct several miles in length for the purpose of carrying four of the tracks of their railways through the said city :—

Held, that under the said s. 238 and the amending Act of 1909 (8 & 9 Edw. 7, c. 32), ss. 237 and 238, the Railway Committee and the Railway Board had jurisdiction to make these orders; the latter of which virtually superseded the former. The evidence shewed that the lines of rails were laid "upon or along or across a highway"—highway being defined by s. 2, sub-s. 11, of the Railway Act, R. S. C., 1906, c. 37, as including "any public road, street, lane or other public way or communication." As regards the respondent company the lines were laid along an esplanade which was deemed a public highway under 28 Vict. c. 24. As regards the appellant company they were laid along a route as to which there was an actual user by the public whether by right or leave and licence express or implied. It was accordingly within the words "public communication," and exposed to the danger from which the public were under s. 238 entitled to be protected.

Held, further, that the Board where it has jurisdiction may in its discretion make any order of this kind for the protection, safety, and convenience of the public, except where it is restricted by s. 3 of the Act of 1906, which enacts that where the provisions of the Act of 1906 and of any special Act passed by the Parliament of Canada relate to the same subject the latter so far as necessary shall override the former. But Canadian Act 56 Vict. c. 48, relied on by the appellants, which is a special Act within the meaning of s. 2, sub-s. 28, of the Act of 1906, does not relate to the same subject as the Act of 1906. The former empowers the companies affected thereby to construct and use certain specified works; the latter empowers the Railway Board to require railway companies to construct such works as it may deem necessary for the protection and convenience of the public. Effect can be given to both statutes, and s. 3 consequently does not in this case restrict in any way the power of the Board.

An appeal from the order of the Board lies to the Supreme Court under s. 56, sub-s. 2, of the Railway Act, 1906, after the leave prescribed by that section has been obtained, on any question of jurisdiction or law. Under sub-s. 3 the Supreme Court is to determine by its judgment the questions submitted, and under sub-s. 5 to certify its opinion to the Board, which is to make an order in accordance therewith, and that order by sub-s. 9 is declared to be final :—

Held, that the provisions of s. 56 are not sufficient to take away the prerogative of the Crown to grant leave to appeal from the said judgment.

CONSOLIDATED APPEALS by special leave.

The principal appeal, being in what is known as the Viaduct

Case, is from a judgment of the Supreme Court (February 15, 1910) which dismissed an appeal from an order of the Board of Railway Commissioners for Canada (June 9, 1909). The minor appeal, in what is known as the Yonge Street Bridge Case, is from a judgment of the Court of Appeal for Ontario (September 17, 1907) affirming a judgment of Anglin J. (May 25, 1906) in two consolidated actions, brought respectively by the appellant and respondent railway companies, to the effect that an order of the Railway Committee dated January 14, 1904, was intra vires and valid. The questions raised by these appeals are as to the jurisdiction of the Railway Committee of the Privy Council of Canada and of the Railway Board which was constituted by statute to succeed it to make the said orders, under circumstances which are not in dispute and are detailed in the judgment of their Lordships, and as to the points of law involved in the decision of the Railway Board and determined by the judgments appealed from.

The order in the minor appeal, called the Bridge Order, directed the two companies to construct a bridge carrying a street known as Yonge Street in the city of Toronto over their railways. The order in the principal appeal, called the Viaduct Order, directed the two companies to construct a viaduct several miles in length for the purpose of carrying four of the tracks of their railways through the city of Toronto. The bridge would not be required if the viaduct is made, and the city of Toronto, after obtaining the judgment of the Court of Appeal upholding the validity of the Bridge Order, announced its intention not to enforce it, but to obtain the adoption of the viaduct scheme.

The Railway Act of 1906 and amending Acts of 1908 and 1909 preserve to the Railway Board of Canada the earlier powers of the Railway Committee of the Privy Council of Canada; but these powers are amplified and extended, so as to deal with the protection, safety, and convenience of the public, both where application is made for leave to construct the railway upon, along, or across a highway and where the railway is already constructed upon, along, or across a highway: see ss. 237 to 241 inclusive of the Railway Act of 1906.

The Railway Act of 1906, as amended in 1908, empowered the

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Railway Board in all such cases as above set out to order that the railway be carried over or under the highway or that the highway be carried over or under the railway as set out in the same amended sections.

Some of these sections were further amended by the Act amending the Railway Act passed on May 19, 1909 (8 & 9 Edw. 7, cap. 32), before the date of the order made by the Railway Board on June 9, 1909. The most important sections in question as they now stand in the Railway Act by virtue of the amendment of 1909 are ss. 237 and 238.

Sect. 237 relates to applications and orders for leave to construct a railway as aforesaid; while s. 238 deals with the case where a railway is already so constructed and is as follows:—

"238. Where a railway is already constructed upon, along or across any highway the Board may upon its own motion or upon complaint or application by or on behalf of the Crown or any municipal or other corporation or any person aggrieved order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway, and may cause inspection of such portion, and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection safety and convenience of the public as it deems expedient, or may order that the railway be carried over under or along the highway, or that the highway be carried over under or along the railway, or that the railway or highway be temporarily or permanently diverted, and that such other work be executed, watchmen or other persons employed or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction in the opinion of the Board arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected."

The grounds on which the appellant company impugned the orders and judgments are (1.) that the matter of public protection has been specially dealt with in "special Acts" to the exclusion of the powers of the Railway Board; (2.) that there is no jurisdiction in the Railway Board because no highways or

public ways or communications cross the rights of way of the appellant company.

Upon the first point the appellants relied upon the tripartite agreement of July 26, 1892, referred to in their Lordships' judgment, and Dominion Act 56 Vict. c. 48, which gave statutory effect thereto, as constituting a "special Act" relating to the same subject-matter as s. 238 set out above. The second point raised the question whether the appellants' railway is constructed upon, along, or across a highway within the meaning of the Railway Act so as to give the Railway Board jurisdiction.

By s. 2, sub-s. 11, of the Railway Act, 1906, "highway" is defined as including "any public road, street, lane or other public way or communication"; and under Canadian legislation and decisions highways may be created by dedication, by public user, and also by the expenditure of public money thereon for public purposes.

Upon the first point the Court of Appeal for Ontario held that the tripartite agreement, though ratified by Act of the Legislature, still remained a private contract and could not be regarded by a special Act for the wide and far-reaching purposes for which that contention was raised. The Supreme Court judgment was to the effect that the Act relied upon could not oust the jurisdiction of the Railway Board or override the provisions of the Railway Act, which were obviously intended to be of universal application.

Upon the second point the Court of Appeal held that the existence of the prolongation of Yonge Street as a public way or communication crossing the tracks of the appellant company as well as the respondent company on the esplanade was abundantly established both in fact and in law. The Railway Board considered that Yonge Street and most if not all the cross streets or passages to the water were highways within s. 2, sub-s. 11, of the Act, and the Supreme Court concurred in that opinion.

It appeared that the appeal to the Supreme Court from the order of the Railway Board of June 9, 1909, was in pursuance of leave granted under s. 56, sub-s. 3, of the Railway Act, 1906, and

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of leave granted by a judge of the Supreme Court under sub-s. 2 thereof. Sub-ss. 5 and 9 enacted:

"(5.) On the hearing of any appeal, the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board, and are necessary for determining the question of jurisdiction or law, as the case may be, and shall certify its opinion to the Board, and the Board shall make an order in accordance with such opinion."

"(9.) Save as provided in this section:

"(*a*) Every decision or order of the Board shall be final; and

"(*b*) No order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari, or any other process of proceeding in any Court."

The respondents the corporation of the city of Toronto accordingly in their printed case objected that the decision of the Supreme Court of Canada was not appealable. The functions of the Railway Committee and the Railway Board were administrative rather than judicial, and in the absence of express provision there was no appeal from their order. Under the express provision in this case the judgment of the Supreme Court was simply a stated opinion to be remitted or certified to the Railway Board, which was directed to make its order in accordance with such opinion.

Sir R. Finlay, K.C., E. Douglas Armour, K.C., Angus Macmurchy, K.C., and *Geoffrey Lawrence*, for the appellants, contended in reference to the point taken in the respondents' printed case that they were not appealing from the order of the Railway Board or in regard to the exercise of its jurisdiction. The appeals were by special leave of His Majesty in Council from decisions of the Courts below on questions of jurisdiction and law. The sections relied upon could not and did not purport to take away the prerogative to grant such special leave. Reference was made to the Supreme Court Act, R. S. C., 1906, c. 139, s. 59, and the Railway Act, 1906, R. S. C., c. 37, s. 10, sub-s. 2, s. 20, sub-s. 2, s. 26, sub-s. 3, and s. 56.

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for the respondents, contended that there was no right of appeal to the Supreme Court from these orders, but that a case might be stated for its opinion: see Railway Act of 1898, ss. 18 and 21 and ss. 19 and 20. Under the Railway Act of 1906, s. 56, the Governor in Council was empowered (see sub-s. 1) to vary or rescind any order of the Board, but there was no right of appeal except as provided by the later sub-sections, limiting the power of the Court to that of advising the Board, which retained the power of making a final order subject to following the advice so given. Reference was made to *Moses* v. *Parker* (1) and to *In re Wi Matua's Will.* (2)

Sir R. Finlay, K.C., in reply.

The preliminary objection was overruled, reasons to be given thereafter.

The argument thereupon proceeded on the merits, the appellants contending that the jurisdiction of the Railway Committee and the Railway Board to make the orders impugned was ousted by the provisions of the tripartite agreement and the Dominion Act 56 Vict. c. 48, which sanctioned it. This was a special Act within the meaning of s. 3 of R. S. C., 1906, c. 37, and can only be interfered with by another Dominion Act, and meanwhile was the only statutory authority for the construction and operation of the appellants' railway as therein provided and for the construction of the bridges and other extensive works which the appellants have erected for the protection and safety of the public. They further submitted that on the evidence their railway was not constructed upon, along, or across a highway within the meaning of the Railway Act. Their railway was constructed in the waters of Toronto Harbour. It was contemplated that at some time the city might fill in and lay out certain portions of it as streets, but that had not been done and, it was contended, could not be done. It was shewn that any crossing of the appellants' railway by persons desiring access to the wharves and other places of business to the south of it had been in right of the proprietors of those wharves and other places of business. It was further contended

(1) [1896] A. C. 245. (2) [1908] A. C. 448.

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that the appellants' railway could not become a highway by user, as they were incapable by law of dedicating it as such: see *City of Vancouver* v. *Canadian Pacific Ry. Co.* (1); *Grand Trunk Ry. Co.* v. *City of Toronto.* (2) The result is that the appellants' railway is not constructed upon or along or across a highway within the meaning of s. 187 of Dominion Railway Act, 1888, or of s. 238 of the Railway Act, R. S. C., 1906, c. 37, as amended by 8 & 9 Edw. 7, c. 32, s. 5. Even if there was jurisdiction to make the order on the hypothesis that the above contention is incorrect, still it was ultra vires as far as its directions were concerned. It provided for the total abolition of a large portion of the appellants' railway works in Toronto which had been constructed under statutory authority. Sect. 238 did not on its true construction authorize an order to that effect, for it contemplated the continual user of both highway and railway unimpaired.

Sir E. Carson, K.C., H. H. Dewart, K.C., and *W. Bowstead*, for the respondents, were heard upon the question of the jurisdiction of the Railway Board to make the order of June 9, 1909, on the assumption that the railway crossed a highway. Under the Railway Act the Railway Board was created as a new and paramount authority with the fullest jurisdiction over all matters affecting public protection and safety and the rights of the public. This authority expressly and particularly arises where the railway structure and the highway come together and is not controlled or modified by any special Act. No special Act was referred to, for 56 Vict. c. 48, relied on by the appellants, did not relate to the same subject-matter as ss. 237—241 inclusive of the Railway Act, and did not in any way purport to override them and did not embody the agreement or make it part of the Act, while Ontario Act 55 Vict. c. 90 merely authorized the municipal corporation to make the tripartite agreement. It was contended that the use of the land by the public for highway purposes was consistent with the grant thereof for railway purposes and that all the matters dealt with in the order of June 9, 1909, are incidental to and flow out of what the Railway Board in its

(1) (1893) 23 Can. S. C. R. 1. (2) (1900) 32 Ont. Rep. 120, 131.

discretion deemed the best means of securing the public protection and safety. The Board had the fullest discretion in this matter unless it could be shewn to be restricted by the terms of a special Act relating to the same subject-matter: see s. 3 of the Act of 1906. In no case is the Board's discretion as to the terms of its order subject to judicial review, unless it can be shewn that its action is without jurisdiction or otherwise without legal authority.

Armour, K.C., in reply.

The reasons for their Lordships' report to His Majesty were delivered by

LORD ATKINSON. At the close of the arguments of these consolidated appeals their Lordships intimated that they would humbly advise His Majesty that they should be dismissed. They will now give their reasons for the decision at which they arrived.

The first is an appeal from a judgment of the Court of Appeal of Ontario, dated September 17, 1907, confirming a judgment of Anglin J.; and the second is an appeal from a judgment of the Supreme Court of Canada, dated February 15, 1910. By the first of these judgments a certain order of the Railway Committee of the Privy Council of Canada, dated January 14, 1904, and purporting to be made under the 238th section of the Canadian Railway Act, 1906, whereby the two railway companies, the Canadian Pacific Railway Company and the Grand Trunk Railway Company of Canada, were ordered to carry a bridge over their respective lines at Yonge Street in the city of Toronto, called the Yonge Street bridge, was held to be intra vires and valid, and by the second an order, dated June 9, 1909, of a certain body called the Railway Board, created by a statute, styled in the case of the appellants "the Viaduct Order," whereby the two companies were ordered, amongst other things, to construct an elevated viaduct some miles in length for the purpose of carrying two of the tracks of each of their respective lines through the said city, was also held to be intra vires and valid.

The second of these orders, namely, the "Viaduct Order,'

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practically supersedes the first, inasmuch as the bridge at Yonge Street will not be required if the viaduct be constructed.

It is scarcely necessary to point out that their Lordships are not concerned with the ethics of these orders. They are not called upon to express any opinion whatever as to whether the orders are just or unjust, oppressive or the contrary. The Legislature of Canada has thought it right to confer on these two bodies, the Railway Committee and its successor the Railway Board, wide powers. If these powers be abused, or be found to be in their exercise hurtful, the Legislature which conferred them can withdraw or restrict them, or subject their exercise to control. But the only questions with which their Lordships have in this case to deal, in addition to that of the competency of the appeals to be presently disposed of, are, first, whether the Committee and the Board had, under this section of the Act of 1906 as amended by the Canadian Railway Act of 1909, jurisdiction to make the order which they have made. And, secondly, the question whether a certain statute of the Parliament of Canada (56 Vict. c. 48) validating a certain agreement entered into by the two railway companies aforesaid and the corporation of the city of Toronto, styled the tripartite agreement, and authorizing certain works to be executed upon the said railways, which, being executed, have brought the said lines into their present state and condition, is a special Act within the meaning of the Act of 1906, and, if so, whether its provisions are to prevail over those of the section of this latter statute under which the impeached orders purport to have been made.

As to the preliminary point, that an appeal does not lie in this case from these judgments of the before-mentioned Courts, it is to be borne in mind that these are appeals to His Majesty to exercise his Royal prerogative as an act of grace. In the case of *Théberge* v. *Laudry* (1), Lord Cairns, though he held that from the peculiar nature of the jurisdiction exercised by the tribunal in that case—the trial of an election petition—an appeal to the Crown did not lie, yet at p. 106 he is reported to have said that he did not desire to imply any doubt whatever as to the general

(1) (1876) 2 App. Cas. 102.

principle that the prerogative of the Crown cannot be taken away except by express words.

In *Cushing* v. *Dupuy* (1) the Act there under consideration, a Bankruptcy Act, affecting ordinary civil rights, contained the words "The judgment of the Court to which under this section the appeal can be made shall be final." Yet it was held that these were not sufficient to derogate from the Royal prerogative. *Moses* v. *Parker* (2) was a case somewhat resembling *Théberge* v. *Laudry*. (3) It was there held that as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the hands of the judges as the persons from whom the best opinions might be obtained, and not as a Court administering justice between the litigants, such functions do not attract the prerogative of the Crown to grant appeals. In the case of *In re Wi Matua's Will* (4), in which the statute then under consideration declared that the decisions of the native Appellate Court should in litigation in the region of probate be final, it was held that the Royal prerogative was not excluded.

The Railway Board is constituted by the Railway Act of 1903 (3 Edw. 7, c. 58). By s. 26 very extensive powers are given to them as to the orders they may make affecting the rights and obligations of railway companies. For the purpose of exercising their jurisdiction they are a Court of record and have all the powers of a superior Court. By s. 56, sub-s. 2, an appeal, if allowed by a judge of the Supreme Court, lies to that Court from the Board on any question of jurisdiction, and by sub-s. 3, on any question of law, by leave of the Board to the same tribunal. By sub-s. 5 of the same section the Supreme Court is to certify to the Board its opinion on the question of jurisdiction or of law so referred to it, and the Board is to make an order in accordance therewith. And by sub-s. 9 it is provided that the order of the Board is to be final, and is not to be restrained or reviewed, questioned, or removed by prohibition, injunction, &c.

It is argued that, as the Supreme Court only certifies its opinion, the order made is the order of the Board, and

(1) (1880) 5 App. Cas. 409.
(2) [1896] A. C. 245.
(3) 2 App. Cas. 102.
(4) [1908] A. C. 448.

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this is declared to be final. But a Court of Appeal, unless empowered to make such an order as they think the Court appealed from should have made, can only certify its opinion to the Court appealed from, leaving it to the latter to act upon the opinion so expressed and to make the proper order. That is merely machinery, however. Moreover, it is expressly provided by sub-s. 3 of s. 56 that the Court is to determine the questions of jurisdiction and of law referred to it. These determinations are decisions of that tribunal, and in their Lordships' opinion the language of the section is not sufficient, according to the authorities cited, to take away the prerogative of the Crown.

They therefore think that an appeal to the Crown lies from the judgments appealed against.

The question of the jurisdiction of the Committee or the Board to make the orders complained of depends in the first instance on whether these respective lines of rails are laid "upon or along or across a highway" as that word is defined by s. 2, sub-s. 11, of this statute of 1906. That is the condition precedent which must be satisfied before jurisdiction attaches. Now, a highway is defined to include "any public road, street, lane or other public way or communication."

The material facts necessary to be considered in order to determine the question of the jurisdiction of the Committee and Board to make these orders are as follows. The city of Toronto lies along the northern shore of that part of the Lake of Ontario called the harbour of Toronto. Its streets run, for the most part, parallel to the shore, east and west, and at right angles to the north and south. Of the first class, the nearest to the shore was Front Street. In the year 1840, before either of the railway lines was constructed, these cross streets ran down from the north and debouched upon Front Street, which it was only necessary to cross to gain ready access to the harbour.

On February 21 in that year the Crown, by patent, granted to the city of Toronto all the land lying between the top of the bank of the harbour and the water's edge within the limits therein mentioned, and also granted certain lands covered with water situate in front of the city of Toronto,

called water lots, therein described, to hold in trust for the public purposes of the city, and from time to time to lease the said water lots and strips of land for terms not exceeding fifty years, reserving such reasonable rent as the mayor, aldermen, and common council of the city should order and direct, subject to certain covenants, to fill up the same and build thereon, and also to make an esplanade running east and west. The portions of the subaqueous soil of the harbour opposite the termination of the streets running north and south were reserved to the Crown. These inlets, save to the extent hereinafter mentioned, have never been built upon, and the water of the bay still flows over them. They are called slips.

The esplanade not having been built by the corporation of Toronto, an Act of the Province of Canada was passed on June 15, 1853, enabling them to contract with any person or persons who might be willing to construct it in front of and upon the water lots described in the letters patent.

In exercise of this power the corporation entered into a contract, bearing date August 30, 1856, with the Grand Trunk Railway Company, for the construction of an esplanade along the water front 100 feet wide, upon the line originally designed in the patent of 1840. The specification annexed to this agreement contained the following three passages :—

"Streets.—From Brock Street to Berkeley Street inclusive there are to be sixteen streets graded so as to connect the esplanade with the natural shore of the bay.

"Brock Street, Peter Street, and John Street, will have to be graded to the form of inclined planes of no greater degree of inclination than one foot rise in sixteen and a half feet horizontal.

"All the other streets will be formed by level embankments of corresponding height to the esplanade, and extending from its rear line to junction with the several streets as they now slope down to the water."

The map referred to in this agreement, No. 4, clearly shews that the line of the shore of the harbour opposite Front Street was irregular ; that many wharves had been built along it jutting out into the lake far beyond the line of the proposed esplanade,

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and that land covered with water intervened between the line of the proposed esplanade and Front Street.

This contract was admittedly carried out, and the esplanade constructed under it. The last-mentioned space was filled up, and the cross streets coming from the north, which theretofore debouched on Front Street, were prolonged across this newly-formed land and made to debouch on the esplanade. The lines of the Grand Trunk Railway were laid along the esplanade on the level, under the authority of a statute of the Province of Canada passed in the month of June, 1857 (20 Vict. c. 80), a space, 40 feet wide from its southern side, being reserved for that purpose. By s. 7 of this Act, lands or property belonging to the Crown, as the soil and bottom of all these great lakes in Canada do, are exempted from its operation.

By a statute of later date, March 18, 1865 (28 Vict. c. 24), it was enacted that the esplanade should be deemed a public highway, and the corporation were empowered to grant to the Grand Trunk Railway and two other railway companies named therein a right of way over an additional 12 feet 6 inches of its surface on the southern side. But it is by s. 3 expressly declared that nothing contained in the Act should be construed to grant to these railway companies, or any of them, an estate in fee in the esplanade or any part of it.

In pursuance of this enactment, the corporation of Toronto, by deed dated April 19, 1865, granted to the Grand Trunk Railway and the two other companies named therein, the Great Western and Northern, a right of way over, upon, and along 12 feet 6 inches in width off the south part of the Esplanade Street adjoining the northern limit of the south 40 feet thereof, and extending along Esplanade Street from York Street to the eastern limit of the esplanade, for railway purposes, on the terms and conditions in the said statute and the agreement already mentioned set forth, subject, however, to the condition that none of the railway companies should block up or obstruct any of the public streets or crossings leading over the railway tracks to the wharves or water frontage with any trains, cars, or other railway appliances. The above-mentioned condition precedent was, therefore, as to this line admittedly satisfied. The main point

of controversy is, Has it been satisfied in respect to the other line? It is clear from the provisions of the before-mentioned statutes, and from the contents of the several documents referred to, that up to this period, at all events, whatever right the public may have had to pass down the several cross streets already mentioned, to traverse Front Street, and thus gain access to the harbour and its waters, was preserved to them unabated. According to the parol evidence in the case this right has up to the present been freely, openly, and continuously enjoyed without let or hindrance by members of the public, and, most important of all, having regard to some of the points relied upon by Mr. Armour in his able argument, has been sedulously guarded by the Legislature as well as by the ministers of the Crown. The fact that a member of the public had to traverse the made dry land to the south of Front Street and cross the esplanade before he reached the shore of the harbour, instead of reaching it as theretofore almost directly from that street itself, could not alter the nature or extent of his right of access to the waters of the lake. After the construction of the esplanade some of the owners and lessees of the water lots filled up their lots, converting them into dry land, and built piers and warehouses upon them; the spaces, however, immediately opposite the several cross streets which would have formed the sites of their prolongations into the harbour were never granted away by the Crown, but were kept open and used by the public as a means of access to and from the waters of the lake.

Things admittedly remained in this position till the year 1887-1888, when the Ontario and Quebec Railway sought authority to construct, and subsequently actually constructed, the branch line called the Don branch connecting the city of Toronto with their main line. It was subsequently leased to and is now worked by, the Canadian Pacific Railway Company.

This branch not being more than six miles in length, sub-s. 18 of s. 7 of the Railway Consolidation Act of 1879 (42 Vict. c. 9) applied; so that it became necessary, before the line could be made, that the Governor in Council should not only approve of its location, as shewn upon plans deposited in his office, but should also sanction the making of the line, as well as the

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appropriation by the promoters of the lands necessary to be taken for its construction.

The Governor in Council made an order, dated January 25, 1887, approving of the location of the line and sanctioning the making of it, but not containing any express provision for the appropriation of any lands belonging to the Crown. This order was followed by a statute passed May 22, 1888 (51 Vict. c. 53), authorizing the construction of the line and extending the time for its completion to three years, and enacting that the company should not be restrained by anything contained in it from entering Toronto by the said branch, or from expropriating the lands necessary to build their branch. From the map No. 7 referred to in this order it appears that the branch line was to be carried on an embankment abutting on the southern side of the esplanade, resting on the subaqueous soil of the harbour, and consequently upon the shore ends of the water lots and of the slips. The portions of those water lots to be acquired are marked in red, while the inlets, twelve in number, each 66 feet wide, from York Street to Berkeley Street, opposite the several cross streets, including Yonge Street and Bay Street, are coloured white up to the side of the esplanade, and bear the names of the streets to which they are opposite. They are thus evidently treated as the sites of the contemplated prolongation of the streets, the names of which they bear. It was the location and making of the line so delineated and described which the Governor in Council by his order of January 25, 1887, sanctioned.

By an agreement dated March 15, 1888, five weeks after the Governor in Council had thus sanctioned and approved of the making of the branch line, the Crown provided for a further encroachment on the harbour, and agreed to grant its soil and bottom to the corporation up to the New Windmill line, expressly excepting, however, thereout " the strips of land, and land covered with water which coincide with the southward prolongation of all the streets now running to the south front of the esplanade."

In the face of these documents, Mr. Armour contended that the Governor-General in Council had by expressly sanctioning, on January 25, 1887, the construction of the branch line, and

approving of its location, impliedly sanctioned the acquisition by the Ontario and Quebec Company of the fee simple of the portions of the subaqueous soil of the slips on which their embankment was built; and that the public right of access to the remaining portion of the slip was, on the authority of *Corporation of Vancouver* v. *Canadian Pacific Railway* (1), thereby destroyed; and further, that as the company are prohibited from alienating the land so acquired in fee, they could not dedicate anew to the public a right of way over those lands, and that, therefore, any public right of way which might theretofore have existed could not be recreated.

In their Lordships' view the facts do not sustain this contention, and the decision in the *Vancouver Case* (1), which was based on the terms of a particular statute differing entirely from those contained in the statutes referred to in this case, does not apply.

Moreover, in their Lordships' opinion the words "public communication" as distinguished from "public road, street, lane, or public way," must have been introduced into the definition of a highway to meet a case where the members of the public use or traverse a particular route as a means of arriving at, or returning from, a particular place, whether they do so as of right or by leave and licence, express or implied. These words, they think, do not authorize a trespass; but short of that they apply to an actual user by the public whether as of right or not. Indeed it is but natural that this should be so, inasmuch as the action both of the Committee and the Board is directed to promote and secure the convenience and protection of the public, and the danger to the public is the same whether its members traverse the lines of a railway upon which trains run, as of right, or by express or implied permission.

As far then as the highway point is concerned, their Lordships are of opinion that the Railway Committee and the Railway board had jurisdiction to make the orders they respectively made. The point of law arising on the application of s. 3 of the Railway Act of 1906 to the tripartite agreement of July 26,

(1) 23 Can. S. C. R. 1.

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1892, and the statute confirming it, 56 Vict. c. 48, passed April 1, 1893, remains for decision.

This agreement provided, amongst other things, for the closing and diverting of certain streets in the said city; for the construction by the companies of two bridges over both the railway lines at York Street and John Street, and the maintenance of these bridges as public thoroughfares; for the extinguishment by the city of the existing right of the public (if any) to cross the esplanade at the point where York Street, as diverted, touches it, except at Bay Street; for the cost of the maintenance and construction of certain level crossings over both these lines of rails opposite some of the cross streets; for the abandonment of the site the companies had acquired for their Union Station, and the substitution of an alternative site; and for the construction of the works necessary to effect these several changes.

Article 21 of the agreement is to the effect that "except as therein otherwise provided the provisions of the Railway Act and the Municipal Act so far as applicable to anything herein contained shall form part of this agreement as if expressly set out therein." The assumption on which this agreement is based is obviously this, that both the lines of railway should continue to run on the level as theretofore. The agreement could not of itself confer on the companies power to carry out the many works and make the many alterations contemplated by it. It was necessary to obtain parliamentary powers for that purpose. And accordingly this Act of the Dominion Parliament, 56 Vict. c. 48, was obtained, ratifying and validating the agreement, enacting that all the works done, or to be done, under it, as well as those affected by it, were works for the general advantage of Canada, and further enacting that each of the parties to the agreement "might do whatever is on its part necessary in connection with any of the said works in order to carry out and give effect to its undertaking as embodied in said agreement." It was by this statute that power and authority were conferred upon the company to carry out the works specified in, and operate their lines in the manner contemplated by, the tripartite agreement. Their Lordships are therefore clearly of opinion that this Act was

a special Act within the meaning of s. 2, sub-s. 28, of the Act of 1906. But though the Act empowers the companies to construct their works and operate their railways in the way proposed, it does not enact that the works it authorizes shall, if made, never be altered, no matter how surrounding circumstances may change. To give to it such a construction would result in paralysing both the Committee and the Board, and in defeating entirely the object of this remedial statute, the Railway Act of 1906.

It has been urged that the works contemplated by the Viaduct Order can only be carried out at enormous cost, and would, if carried out, amount to a physical transformation of the whole system of these two railways, over about five miles of their length, two of each of their four tracks being elevated into the air, and two others left at their former level, but blocked and interrupted so as to be of comparatively little use for through traffic, and that the access of trains to the contemplated station would be cut off or impeded. This may all well be, but the answer to it is (1.) that the words "or may order that the railway may be carried over, under, or along the highway" have been introduced into s. 238 by the amending Act of 1909, as if to meet such a case as this, and to confer upon the Board the powers they have exercised; and (2.) that unless restricted by the provisions of s. 3 of the Act of 1906, the Board, where it has jurisdiction, may make any order of this kind which it deems expedient for the protection, safety, or convenience of the public.

Now s. 3 enacts that where the provisions of the Act of 1906 and of any special Act passed by the Parliament of Canada relate to the same subject-matter the provisions of the special Act so far as is necessary to give effect to it are to be taken to override the provisions of the Act of 1906. If the subject-matter of the special Act and that of s. 238 of the Act of 1906, as amended, were the same, then there would undoubtedly be a conflict between the two enactments; but they are not the same; the specified works, the power to construct and use them, form the subject-matter of this special Act. The subject-matter of s. 238 is the control of the Board over the railway companies, and the power conferred upon it to require the companies to construct

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such works as it may deem necessary for the protection and convenience of the public. These are wholly different matters. The two statutes can stand together. Effect can be given to each. There is no conflict between their provisions, such as is contemplated by s. 3. Sect. 3 consequently does not restrict in any way the power of the Board; and the question of law referred to the Supreme Court, like that of jurisdiction, was, therefore, in their Lordships' view, rightly decided by the Courts whose decisions have been appealed from. The appeals should accordingly be dismissed, and the appellants will pay the costs.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondents the City of Toronto: *Freshfields.*

[PRIVY COUNCIL.]

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April 4; *May* 19.

GOLDEN HORSESHOE ESTATES COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

THE CROWN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Western Australia Dividend Duties Act, 1902 (2 *Edw.* 7, *No.* 32), *ss.* 5, 6, 13, *and* 15—*Construction—Duty on Dividends declared.*

Under the Western Australia Dividend Duties Act, 1902 (2 Edw. 7, No. 32), ss. 5 and 6, companies which like the appellants carry on their business in Western Australia exclusively are not bound to pay duties in respect of any portion of their profits save that which they devote to the payment of dividends declared.

Sect. 13 enacts that the company may deduct from the dividends and retain for its own use the sums payable for duties imposed thereon; and s. 15 enacts that "when a dividend is distributed before the duty payable in respect thereof is deducted and paid, the duty shall be a debt due by the person receiving the dividend to His Majesty":—

Held, that to make sense of s. 15 the words "deducted and paid"

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* *Present:* LORD ATKINSON, LORD ROBSON, SIR ARTHUR WILSON, and SIR SAMUEL EVANS.

must be read as "deducted or paid," and that then the section would bear the reasonable and just meaning that where the duties have been paid by the company, and also where though not paid they have been deducted by the company from the dividends declared, the shareholders are not to be liable as debtors to the Crown in respect of them.

APPEAL from an order of the above Court (May 19, 1910) confirming an order of Burnside J. (December 14, 1909).

The respondent claimed 4275*l.* as duty payable by the appellant company under the local Act 2 Edw. 7, No. 32, the material sections of which are set out in their Lordships' judgment.

From 1903 to 1909 inclusive the company paid 1,710,000*l.* as dividends to its shareholders without deduction of duty, which duty it paid to the respondent, amounting to 85,500*l.*, or 5 per cent. on the total dividends.

On October 29, 1909, the respondent delivered a statement of claim under the Crown Suits Act, 1898 (62 Vict. No. 9), and under the said 2 Edw. 7, No. 32, for 4275*l.* duty on the 85,500*l.* which had been paid to the shareholders and had not been deducted from their dividends.

Both Courts allowed the claim. The reasons of McMillan J. were as follows:—

"We ought, I think, to look at the Act as a whole, and a consideration of the whole Act leads me to the conclusion that the Legislature intended to tax profits. In the case of local companies, those which carry on business in Western Australia and not elsewhere, there is a qualification, because only that portion of the profits which from time to time becomes available for and is used for the purpose of a dividend has to bear the duty, and when that happens I think that the intention of the Legislature as shwen by this Act read as a whole is that the duty shall be deducted from the full amount of the dividend on which it is imposed. Sect. 7 deals with companies which carry on business in this State and elsewhere, and in the case of companies of that kind the minister assesses the profits made by the company in Western Australia and upon such assessment the company has to pay a duty of one shilling for every twenty shillings of the profits. In the case of a local company the obligation as set out in s. 6 is to pay the minister a duty equal

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to one shilling for every twenty shillings of the amount or value of the dividend declared. The other sections which I think material are ss. 11, 12, 13, 14, 15, and 16. I attach very great importance to s. 15 because it seems to me to be a very reasonable section if the intention was that the duty should be deducted from the dividend by the company, for in the event of that not being done the giving of a remedy against the shareholder would be simply compelling him to pay that which ought to have been paid on his behalf by the company. A different construction to the one which I think should after reading these sections be placed on this Act would have the result of allowing a portion of the profits which finds its way into the pocket of the shareholder to be free of duty because the shareholder would receive his dividend in full, and a duty would be paid out of profits which if the dividend were required to bear its own burden would be free for subsequent distribution and would then be subject to the payment of duty."

Sir R. Finlay, K.C., *Keenan, K.C.*, and *H. O'Hagan*, for the appellants, contended that the Crown had received all that it was entitled to under the Act. The tax was imposed on the company in respect of the total dividend declared. It varied with the amount declared and was not in any way concerned with or dependent upon what was paid to the shareholders. There was no obligation under the Act to deduct the duty from the dividend declared, and so long as the company paid it within seven days of the declaration and before distribution the liability was satisfied. It was contended that the terms of s. 6 were plain and not controlled by any other section, s. 13 merely providing that the company "may" deduct it. Reference was made to *Julius* v. *Bishop of Oxford.* (1); *In re Baker, Nichols* v. *Baker.* (2) In a taxing Act especially the words used must be strictly construed, and liability or obligation does not arise unless expressed by clear and unambiguous language. See Craies' Stat. Law, 2nd ed., p. 119, referring to *Oriental Bank* v. *Wright* (3); *Simms* v. *Registrar of Probates* (4); *Lord Advocate*

(1) (1880) 5 App. Cas. 214.
(2) (1890) 44 Ch. D. 262.
(3) (1880) 5 App. Cas. 842, 856.
(4) [1900] A. C. 323.

v. *Fleming* (1); *Pryce* v. *Monmouthshire Canal and Railway Companies*. (2)

Upjohn, K.C., and *E. W. Hansell*, for the respondent, contended that the judgments of the Courts below were right for the reasons therein stated. The ultimate incidence of the duty is on the recipient of the dividend; and under the provisions of the Act the duties payable on the dividends declared in this case were payable out of the dividends and not out of other funds of the company. It was contended that the sum of 85,500*l.* which had been paid to the shareholders, instead of being deducted, had escaped payment of duty altogether. It was an advantage or gain paid or credited to shareholders and was liable to pay duty under the Act. Sect. 13, it was contended, was obligatory in its terms and not merely permissive, and the company was bound to deduct the duty from the dividends paid. Otherwise the amount represented by the required deduction was distributed amongst the shareholders out of profits not declared to be distributable and thus evaded the payment of duty. Reference was made to *Rex* v. *Barlow*. (3)

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The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Supreme Court of Western Australia, composed of two judges, McMillan and Rooth JJ., dated May 19, 1910, confirming a judgment of the Court of first instance dated December 14, 1909, whereby it was ordered that the appellant company should pay to the Crown, the plaintiff in the suit, a sum of 4275*l.*, no order being made as to costs.

This sum represented the amount of the duties claimed to be payable by the appellants to the Crown under the Dividend Duties Act, 1902, of Western Australia (2 Edw. 7, No. 32) on that portion of their profits which they had devoted from the year 1903 to the year 1909, both inclusive, to paying the duties which they were under that statute bound to pay to the Crown in respect of the dividends they declared to be payable, and subsequently paid to their shareholders without deduction.

(1) [1897] A. C. 145, 152. (2) (1879) 4 App. Cas. 197, 202.
(3) (1693) 2 Salk. 609.

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Rooth J. differed from McMillan J., holding that, on the construction of this statute, the Crown was not entitled to recover the sum sued for, but being the junior judge he withdrew his judgment, stating that he did so in order that the judgment against the present appellants might, if these latter so desired, "go to a higher Court."

The facts are few and undisputed, and in their Lordships' view the matter for decision, namely, the proper construction of ss. 5 and 6 of the above-mentioned statute, the only taxing sections it contains, plain and clear.

The Act is entitled "An Act to impose Duties in respect of Dividends or Profits of Incorporated Companies."

For some reason known to its authors, but not disclosed on the face of the statute, duties are not imposed upon the profits earned by companies which, like the appellant company, carry on their business in Western Australia exclusively. These companies are not put under any obligation to pay duties in respect of any portion of their profits save that which they devote to the payment of the dividends they declare to be payable to their shareholders. Sects. 5 and 6 run as follows:—

"Sect. 5. There shall be levied and paid to the minister [being the Colonial Treasurer or other minister charged with the administration of the Act] for the use of His Majesty the duties hereinafter provided.

"Sect. 6.—(1) Within seven days from the time any dividend is declared by a company carrying on business in Western Australia, and not elsewhere, such company shall—

"(*a*) forward to the minister a return in the prescribed form, containing the prescribed particulars verified by a statutory declaration;

"(*b*) forward to the minister a copy of the company's balance-sheets for the period during which the dividend was earned; and

"(*c*) pay to the minister a duty equal to one shilling for every twenty shillings of the amount or value of such dividend.

"(2.) If the minister is not satisfied with the declared value

of any dividend, not being money, he may assess such value, and the excess duty on such valuation shall be paid within fourteen days thereafter.

"(3.) This section shall not apply to any company which comes within the operation of section eight.

"(4.) A company having a registered office outside Western Australia shall not, for that reason only, be deemed to be carrying on business elsewhere than in Western Australia."

The sum to be paid is under sub-s. (*c*) measured by the amount of "such dividend," i.e., of the dividend mentioned in the earlier part of the section, namely, the dividend which they have declared.

By the word dividend is ordinarily meant "that share of a company's profits which is payable to its members in respect of their shares . . . ." And the power of settling and deciding what that share in any given year is to be is generally entrusted to the directors of the company with or without the sanction of the shareholders: Lindley on Companies, 6th ed., vol. 1, p. 598. The declaring of a dividend can only mean, therefore, the authoritative announcement of the decision of the directors on this matter sanctioned, where necessary, by the shareholders.

Owing to the definition of the word dividend contained in this Act as including "every profit, advantage, or gain, intended to be paid or credited to or distributed among any members of any company," the directors would have been entitled to decide and declare that things other than and different from money, such as shares in some company, for instance, should have been given to their shareholders as dividends. Sub-s. 2 of s. 6 provides for such a case; but in the present case they have not done that. The resolution declaring the dividend has not been printed. All that appears is that certain dividends were declared in certain years and paid by the company to their shareholders. It is beside the point therefore to argue as to what the company were empowered to declare, or what they might have declared as dividends payable or assignable to their shareholders. The point is what they have in fact declared as dividends; for it is in respect of these, and these alone, that they or any other body or persons are required to pay duty.

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The measure of the duties has been supplied and the obligation to pay imposed by s. 6. The rights and interests of the revenue are safeguarded by ss. 11, 12, and 18. The first of these latter provides that the duties imposed by the Act are debts due by the companies to His Majesty, and become due and payable at the times when the returns, i.e., the returns mentioned in s. 6, ought respectively to be made. The second provides that no company shall distribute its dividends until the duties payable in respect thereof have been paid. And the third imposes heavy penalties upon a company which, contrary to the Act, distributes any dividend before the duty payable in respect of it has been paid. It is not suggested that this company has failed in any respect to discharge the duties imposed upon them by these sections. They must presumably have during the six years duly forwarded to the minister copies of their balance-sheets, and also forwarded the particulars required to be furnished duly verified under s. 6. They have admittedly during these six years paid the duties on the dividends declared by them to be payable to their shareholders. In what then does their default consist? In this, it is urged, that s. 13 enacts that the company may deduct and retain for their own use the sums payable in discharge of these duties from the dividends in respect of which the duties were imposed, and this the company, admittedly, has not done.

The words of the section, it is argued, are no doubt permissive in form, the word used being "may," not "must," but they, it is said, give a power to do a certain thing; and, to use the words of Lord Cairns in *Julius* v. *Bishop of Oxford* (1), "there may be something in the nature of the thing empowered to be done . . . . something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so." But when it is asked what, in the present case, is this "something" connected with the power to deduct the duties from the dividends declared which imposes a duty upon the company to exercise their power in that respect, and makes the

(1) 5 App. Cas. 214, at p. 222.

deduction compulsory in its nature, the reply, as understood by their Lordships, is: "If this be not done, the shareholders will, to the amount of the duties which might have been deducted from their dividends, but were not, gain a benefit or advantage out of the profits of the company, upon which no duties will have been paid." This gain, it is urged, is in fact an augmentation of, or accretion to, the dividends, and should be treated as part of them, inasmuch as it was "intended to be paid or credited to, or distributed amongst, the shareholders," and therefore comes within the definition of "dividend" in the Act. The reply to this contention is (1.) that this benefit or advantage is not part of the dividends which the company have, in fact, declared, and in respect of which alone is duty payable; and (2.) that if the shareholders derive this benefit out of the profits of the company in such a case, there is no reason why they should not. The profits are not taxed. The surplus profits of any year may be carried forward to swell the dividends of next year, or they may be employed in many ways, quite legitimate in themselves, to increase the credit and stability of the company, and thereby enhance the value of the shares to the direct gain and advantage of the shareholders. Yet this increment in value is not taxed, nor are the profits expended to create it taxed. What then it may be asked is the special vice which distinguishes the gain or advantage derived by shareholders out of surplus profits in this case from gains and advantages of the above character? There might possibly be some strength in the contention put forward if the object of s. 13 was to collect the duties at the source; but it is not so, since the sums deducted are not handed over to the revenue, but retained by the company for its own use. Reliance is also placed by the respondent on the clumsily worded section number 15. That section runs as follows: "When a dividend is distributed before the duty payable in respect thereof is deducted and paid, the duty shall be a debt due by the person receiving the dividend to His Majesty." This cannot mean that the shareholder receiving dividends the duty upon which has been paid, and the debt to the Crown in respect of them thereby discharged, remains a debtor to His Majesty if no deduction from these dividends has, in fact, been made; else the Crown would

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be enabled to recover the same duty twice over. To make sense of s. 15 the word "and" must be read as "or," and the words "deducted and paid" as "deducted or paid." The section will then mean what it is reasonable and just that it should mean namely, that where the duties have been paid by the company and the debt due to the Crown thereby discharged, or where the duties though not paid by the company to the Crown have in fact been deducted by the company from the dividends, the shareholders are not to be liable as debtors to the Crown in respect of them.

Even in this latter case the interests of the revenue would be amply protected through its remedies against the company for the recovery of the duties.

It is lastly urged on behalf of the respondent that the whole scheme of the statute is that the burden of these duties should be borne by the shareholders. That is true, no doubt, in the sense that every pecuniary burden thrown upon a limited company is intended to be borne by the shareholders, inasmuch as it must be discharged out of the earnings of the company, thereby diminishing the sum available for distribution as dividends, or out of the reserves of the company, or out of the calls which the shareholders may be obliged to pay; but in no other sense is it true. The hand to pay under this Act is that of the company. The duty to pay is primarily cast upon the company. If it makes default the shareholders become responsible, but, according to what appears to their Lordships to be the correct construction of s. 15, only in this latter case when the duties have not been deducted from their dividends. It may be desirable that the advantage the shareholders gain by having the duties paid by the company out of their profits without deduction should be taxed, but in their Lordships' view the words of s. 6 are plain and clear. They do not provide for such a case, and it is not permissible to twist its words from their ordinary meaning and construe them in a strained or unnatural sense in order to extend the liability of the subject to taxation not imposed upon him by plain and unambiguous enactment, however beneficial in the interest of the revenue such a course might be.

Their Lordships are therefore of opinion that this appeal

should be allowed, and they will humbly advise His Majesty accordingly.

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Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*
Solicitors for respondent: *Sutton, Ommanney & Rendall.*

[PRIVY COUNCIL.]

WYATT AND OTHERS . . . . . APPELLANTS;

AND

ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC . . . . . RESPONDENT.

J. C.*
1911
March 1, 2, 6; *June* 13.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Rights of Fishing—River navigable and floatable—Exclusive Right of the Crown to Fishing—Letters Patent in respect of Lands did not convey Fishing Rights—Construction.

The appellants were grantees of lands on both sides of a river which was shewn by the evidence to be navigable and floatable at such locality and from thence to its mouth:—

Held, that the right of fishing in the river vested exclusively in the Crown, and that, as the letters patent to the appellants in 1883 granting the said lands were plain and unambiguous in their terms and did not specifically grant rights of fishing in the river opposite thereto, the patentees could not claim such rights under previous or subsequent correspondence as enlarging the terms of the grants, or by reason of such rights having been exercised by them continuously from the date of the patents without hindrance or interference.

APPEAL by special leave from a judgment of the Supreme Court (October 17, 1906) reversing a judgment of the Court of King's Bench, Appeal Side (January 12, 1906), and restoring a judgment of the trial judge, Larne J. (February 16, 1904).

An information was filed on March 18, 1903, on behalf of the Crown by the Attorney-General of the Province of Quebec, for the purpose of obtaining a decision of the Court as to the right of fishing in the Moisie River in that Province.

* *Present:* LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, and SIR ARTHUR WILSON.

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The Crown claimed that the river between the lots granted to the defendant Fraser (the other defendant Adams being his lessee) was "public, navigable, and floatable" and as such a "dependency for the Crown domain"; "that the right of fishing therein is exclusively vested in the King in his right of the Province of Quebec, and in such person or persons as the Crown may have leased or may in the future lease the same to"; and that Fraser and Adams and all persons claiming under them "be declared to have no right to fish in the said river Moisie or any part thereof," and to be perpetually enjoined from fishing therein.

The appellants are Fraser's legal representatives and contended that they were riparian proprietors of the lots of land in question by virtue of letters patent from the Province of Quebec and as such had the exclusive right of fishing in the river opposite to such lots; that for years before and after the grant, and at the time it was made, the Government of Quebec by the acts, letters, and writings of its ministers and officials always recognized such right; and also that the river was neither navigable nor floatable, and that in consequence they as riparian proprietors owned the stream and the fishing therein.

The letters patent dated June 21, 1883, conveyed the lots of land, which were five in number, on either side of the river and had a frontage thereon. No reference was made in any of those instruments to the right of fishing. They were all expressed in the same terms, the habendum being to the grantee, "his heirs and assigns for ever in free and common soccage, by fealty only, in like manner as lands are holden in free and common soccage in that part of Great Britain, called England. Provided always that this grant is subject to the provisions of the Act 43 and 44 Victoria chap. 12, entitled: 'The Quebec General Mining Act of 1880.'"

At the trial evidence was given as to the negotiations between Fraser and his associates and the Department of Crown Lands which led up to the grant of the letters patent; also as to the character of the river between the lots of land granted and as to its fitness for useful navigation.

The trial judge found (1.) that the negotiations did not contradict the clear language of the grants, and did not

disclose an intention on the part of the Crown to convey anything more than the lands described in the grant; (2.) that the river Moisie from a point above the lands granted to its mouth is a public navigable and floatable river, forming part of the Crown domain.

The Court of Appeal reversed this judgment on the ground that prior to the issuing of the patents for the riparian lots in question there had been a concluded agreement between the applicants and the Crown to the effect that the applicants should have, in addition to the lots of land, the right of fishing in the river opposite to them.

The Supreme Court held that the patent in question was plain and unambiguous in its language; that the rights of the parties must be determined by it, and cannot be added to, altered, or diminished by any previous negotiations written or oral leading up to its issue; that if evidence of correspondence were admissible it failed to establish any independent or collateral contract; that the legal effect of the patent in regard to the fishing rights in question depended upon the determination of the question whether the river in the course of the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of the Province of Quebec. Adopting the test of navigability laid down in *Bell* v. *Corporation of Quebec* (1), the Supreme Court concurred with the findings of the trial judge, which were not questioned by the judgment of the Court of Appeal, that the river in question in the locality of the lands granted and from thence to its mouth was navigable and floatable.

Macmaster, K.C., Duke, K.C., Belleau, K.C., and *Halsey,* for the appellants, contended that this judgment should be reversed and that of the Court of King's Bench restored. It was clear from the correspondence and course of dealing between the parties that the Government intended to sell and Fraser and his associates intended to acquire not merely the lots of land on either side of the river, but the fishing rights in the river between them. The letters patent on their true construction gave effect to this contention and did not derogate from the clear purpose disclosed

(1) (1879) 5 App. Cas. 84, 92.

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by the correspondence. The Court of King's Bench was right in holding that the transaction was based on a written application by the appellants' predecessors for the purchase of the lots, and the right of fishing, that the Crown had assented thereto, and that the grantees had publicly and peaceably possessed and enjoyed the fishing rights for twenty years. The only point left open by the concluded contract was to fix by mutual consent the extent of the grant alongside the river and the price. The mere silence of the subsequent patents as to fishing rights was insufficient to detract from the legal effect of the agreement duly made and acted upon for so long a period. Moreover the evidence shewed that the river was in fact non-navigable and non-floatable and that the application for the lots and its acceptance proceeded upon that footing to the knowledge of both parties. Consequently the intention and effect of the transaction were to convey the property in the river which carried with it the right of fishing as incident thereto, unless there was an express reservation to the contrary. This river was not navigable for the purposes of ordinary commerce. Logs and timber might be floated, but such navigation as was shewn to exist did not satisfy the test laid down in *Bell* v. *Corporation of Quebec.* (1) It must be shewn that the river can be employed for the purposes of traffic. This river is 400 miles long, and it is not suggested that it is navigable except for the lower seventeen or eighteen miles of its course ; and as regards that portion, there was only an intermittent and non-continuous carriage of fish in small river craft. There was no general traffic, the soil was too poor for cultivation, and the population too slight to produce commercial products. Reference was made to the Quebec Civil Code, art. 400 ; Quebec Act 62 Vict. c. 23, s. 1374 (*c*), sub-s. 4 ; *Reg* v. *Robertson* (2) ; *Attorney-General for Trinidad* v. *Bourne.* (3)

Sir R. Finlay, K.C., Lafleur, K.C., and *Hamar Greenwood,* for the respondent, contended that there were concurrent findings of fact by the trial judge and the Supreme Court that the river opposite the lots granted to the appellants' predecessors and thence to its mouth was navigable and floatable. The Court of

(1) 5 App. Cas. 84, 92.
(2) (1882) 6 Can. S. C. R. 52.
(3) [1895] A. C. 83.

King's Bench did not disturb this finding and pronounced no opinion to the contrary. The result was that by the law of the Province of Quebec the right of fishing therein was exclusively vested in the Crown unless specially granted. Reference was made to the *Fisheries Case, Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec, and Nova Scotia* (1); *Reg.* v. *Robertson* (2); *Hurdman* v. *Thompson.* (3) Accordingly the letters patent were grants of land only, bounded by a navigable and floatable river, and did not and were not intended to grant any rights of fishing. The silence of the grants as to fishing is readily explained by the fact that up to 1898, when the *Fisheries Case* (1) was decided, it was generally supposed that the fishing in navigable rivers was controlled by the Dominion Government and not by the Province. It was contended that there was no special grant of fishing in the letters patent, and no evidence of any completed contract between the parties prior thereto. The negotiations leading up to the grants could not be received in evidence for the purpose of enlarging or modifying the clear and unambiguous terms of those grants; and it was contended that if received they failed to establish any independent or collateral contract. There was no evidence of any misleading statements or of any negligence in disclosing material facts which would create an estoppel. Moreover no estoppel can be created against the Crown by misleading statements or suppressions of fact by its servants; otherwise the effect might be that the Crown would be compelled to grant rights which it might be inexpedient on grounds of public policy to part with.

Macmaster, K.C., in reply, cited *Attorney-General and City of Hull* v. *Scott* (4); *Ramsden* v. *Dyson* (5); *Plimmer* v. *Mayor, &c., of Wellington* (6); *Rees* v. *Miller.* (7)

1911
June 13.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from the unanimous judgment of the Supreme Court of Canada reversing a judgment

(1) [1898] A. C. 701, 709.
(2) 6 Can. S. C. R. 52.
(3) (1895) Quebec L. R. 4 Q. B. 409, 445.
(4) (1904) 34 Can. S. C. R. 603.
(5) (1866) L. R. 1 H. L. 129, 170.
(6) (1884) 9 App. Cas. 699, 710.
(7) (1882) 8 Q. B. D. 626, 629.

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of the Court of King's Bench in Quebec and restoring that of the Superior Court.

The question relates to the right of fishing in a stretch of the river Moisie, some six miles long, lying below the first rapids met with in going up the river. The Moisie is a large river about 200 miles in length. The first rapids are about seventeen miles from its mouth. They are known as the Grand Portage.

The proceedings in this action were commenced by an information filed on behalf of the Crown by the Attorney-General of the Province of Quebec complaining of the late defendant Fraser and his co-defendant Adams. Under letters patent granted in 1883 Fraser became the proprietor of narrow belts of land on both sides of the river. The respondent Adams was his lessee. Fraser and Adams claimed to be entitled to the exclusive right of fishing in the river opposite Fraser's lands. The information prayed for a declaration that the river opposite those lands was a public, navigable, and floatable river, forming part of the dependency of the Crown domain in the Province of Quebec, and that the right of fishing was exclusively vested in the Crown in right of the Province of Quebec and in the Crown's lessees. The information concluded by asking for an injunction in accordance with that declaration.

The defendant Fraser, on the other hand, by his plea claimed to have the exclusive right of fishing opposite to his lands. He alleged that for years before and after the date of the letters patent the Government of Quebec, by the acts and letters of its ministers and officials, recognized such rights. He asserted, moreover, that the river was neither navigable nor floatable, and that consequently the riparian proprietors were owners of the stream and the right of fishing in it.

The Attorney-General demurred to so much of the defendant's plea as alleged facts tending to vary or supplement the letters patent under which Fraser claimed. The demurrer was sustained in the Superior Court, but it was overruled on appeal by an order of the Court of King's Bench on the ground that the allegations in question were relevant and contained facts tending to support the pretensions of the defendants that the grant from the Crown included the right of fishing in the river opposite

the lands granted. From that order there was no appeal. Evidence was then gone into at great length. The trial judge held (1.) that the negotiations between Fraser and his associates on the one hand and the Department of Crown Lands on the other did not disclose an intention on the part of the Crown to convey to the applicants anything more than the lands described in the letters patent, and (2.) that the river Moisie from the Grand Portage to its mouth was a public, navigable, and floatable river.

In the Court of King's Bench this judgment was reversed on the ground that, prior to the issue of the letters patent in 1883, there was a concluded agreement between the applicants and the Crown to the effect that, in addition to the land which was the subject of the grant, the grantees should have the right of fishing in the river opposite.

The Court of King's Bench did not pronounce any decision as to the navigability of the river Moisie at the place in question.

The avowed object of Fraser and his associates in applying for grants of land along the banks of the Moisie was to secure the right of fishing in the river. The Government of Quebec, however, was not asked to grant any rights of fishing with the lands which were the subject of the application. At the same time it cannot be disputed that, from the date of the letters patent until recent times, it was considered, even by officials of the Quebec Government, that the right of fishing in the river opposite to the lands granted to Fraser and his associates did belong to the applicants and to Fraser as their representative and successor in title; and undoubtedly such right was exercised by them and by him continuously without hindrance or interference. Beyond this the evidence does not go. There is no suggestion of encouragement on the one hand, or of expenditure of money on the other, such as might possibly raise an equity against the real owner if the controversy were between private persons. On the contrary, it appears that for many years Fraser and his predecessors in title derived a large revenue from the fishing without any expenditure of money beyond the comparatively trifling sum paid as the consideration for the land grants.

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The attitude of the parties is probably explained by the fact that at the time when the applicants were in negotiation with the Quebec Government it was a moot point whether rivers which were Crown property belonged to the Crown in right of the Dominion or in right of the Province. That question, which was one of considerable difficulty under the peculiar wording of Sched. III. of the British North America Act of 1867, was not finally settled until the year 1898, when it was held by this Board, affirming the Supreme Court, that under the words "rivers and lake improvements," in Sched. III., rivers, apart from improvements, were not vested in the Crown in right of the Dominion, but remained vested in the Crown in right of the Province.

It was, moreover, supposed or taken for granted that the river Moisie was not a navigable or floatable river.

The matter has been dealt with so fully and so satisfactorily in the judgment of the Supreme Court, delivered by Girouard J., that it is unnecessary for their Lordships to go through the facts of the case. They cannot do better than repeat the concluding words of the judgment.

"Summarized," says the learned judge, "our holdings are :— That the patent issued by the Crown is plain and unambiguous in its language; that the rights of the parties must be determined by it, and cannot be added to, altered, or diminished by any previous negotiations written or oral leading up to its issue; that therefore the application of the patentee and subsequent correspondence between him and the Crown officials should not have been received in evidence for the purpose of explaining the patent, and, if looked at for the purpose of establishing an independent or collateral contract conferring additional rights upon the patentee, entirely failed to do so; that the legal effect of the language of the patent with respect to the bed of the river and the fishing rights therein depends upon the determination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council . . . . we concur with the findings of the trial judge, and which findings

are not questioned in the judgment of the Court of Appeal that such river at such locality and from thence to its mouth is so navigable and floatable."

The matter, as the learned judge points out, must depend ultimately upon the question of the navigability of the river Moisie. It may be, as contended by the learned counsel for the appellants, that the evidence in favour of navigability is not so clear or so strong as the learned trial judge considered it to be. But still in the opinion of their Lordships there is sufficient evidence to support his finding; and this is not a case in which their Lordships would lightly dissent from the concurrent findings of the trial judge and the Supreme Court of Canada.

It may perhaps seem hard, as urged by the learned counsel for the appellants, that persons should be deprived of so valuable a property after enjoyment so long continued. But it must be borne in mind that when the advisers of the Crown sought to establish the right of the Government of Quebec they were met, not by an appeal for favourable consideration, but by a claim of adverse right which left them no alternative but to institute hostile proceedings by way of ejectment.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

The appellants will pay the costs of the appeal.

Solicitors for appellants: *Hills, Godfrey & Halsey.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1911
May 4, 23.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

THE STANDARD TRUST COMPANY OF NEW YORK . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Sale of Railway to a Company by its Promoters—Purchase authorized by its Incorporating Act—Promoters the only Shareholders—Sale and Purchase upheld as intra vires the Company.

A syndicate of four persons procured a Quebec Act incorporating a railway company which they had promoted and subscribed for $300,000 of the company's shares (being all that were issued), and were with others whom they had qualified elected directors. They then purchased a railway themselves, and the incorporated company, being empowered so to do by their Act, purchased the said railway from them for $648,000, paying for it by taking credit for the said subscription and acknowleding indebtedness to the said four persons of the balance of $348,000 in equal shares. On the insolvency of the said incorporated company and of another company with which it had been amalgamated their railways were sold, and the respondent company, to whom the syndicate's claim had been assigned, claimed to rank as creditors against the proceeds of sale:—

Held, that the claim must be allowed. The incorporating Act authorized the purchase, and whether or not the price was excessive every one interested in the capital of the company concurred in the purchase with full knowledge of all the circumstances.

Salomon v. *Salomon*, [1897] A. C. 22, followed.

APPEAL by special leave from a judgment of the Supreme Court (February 15, 1910) affirming a judgment of the Exchequer Court of Canada (October 31, 1908) confirming a report by the referee which admitted the claim of the respondent company to rank as a creditor of the South Shore Railway Company for the sum of $520,779.

On March 7, 1904, the Minister of Railways proceeded under

Present: VISCOUNT HALDANE, LORD MACNAGHTEN, LORD MERSEY, and LORD ROBSON.

Dominion Act 3 Edw. 7, c. 21, against the Quebec Southern Railway and South Shore Railway Company, which had amalgamated together, for the sale of their railways on the ground that they were insolvent and had failed to work their railways. Under Act 4 & 5 Edw. 7, c. 158, the sale was effected.

On February 24, 1906, the respondent company filed a claim before the referee of the Exchequer Court against the proceeds of the said sale, which so far as is now material was for $348,000, being the balance of the price of the Montreal and Sorel Railway bought by the South Shore Railway Company from a syndicate of four persons to whom the purchasing company acknowledged indebtedness in respect of the said balance with interest at 6 per cent., their claim being subsequently assigned to the respondents.

The referee reported in favour of the claim, but the Bank of St. Hyacinthe and subsequently the appellant, as an unsecured creditor of the Quebec Southern Railway, objected. So far as now material their point was that the authority given by the directors of the South Shore Railway Company to purchase the Montreal and Sorel Railway was illegal and irregular.

They objected that the syndicate of four were promoters of the South Shore Railway Company and occupied a fiduciary position towards it, which prevented them from making any profit on the transaction, and that the price of $648,000 was not duly authorized and was unfair in amount.

The respondents answered that the real value of the railway and its appurtenances was $648,000; that the syndicate did not have any commission or mandate from the South Shore Railway Company to purchase the property of the Montreal and Sorel Railway; that they were hypothecary creditors of this latter property, holding 1453 first mortgate bonds of 100*l.* each, and had also expended large sums of money in improving and putting the said road in operation long prior to the incorporation of the South Shore Railway Company; that Tourville (one of the syndicate) purchased the road at a sheriff's sale in the interests of himself and his associates, and for the protection of their hypothecary rights; that the sale by them to the South Shore Railway Company of this property was made with full understanding on the part of all persons having any interest whatever

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in the transaction; and that the South Shore Railway Company retained the property, adopted, ratified, and confirmed the purchase, and thereby became bound to pay the consideration price agreed upon therefor.

The referee allowed the claim of the respondent company, and both Courts upheld his decision.

Frank Russell, K.C., and *Aimé Geoffrion, K.C.*, for the appellant, contended that the members of the syndicate stood in a fiduciary relation to the South Shore Railway Company and were not entitled to make any profit on the transfer by them of the Montreal and Sorel Railway to the said company. The evidence shewed that the purchase of the Montreal and Sorel Railway had cost the syndicate less than $300,000. The granting of a bonus of $348,000 to the promoters and incorporators of the company was a misapplication of its funds and therefore ultra vires. The members of the syndicate were under a legal duty at the time of the sheriff's sale to buy the railway for the company at the best price possible. Though they remained the only shareholders in the company the intention had all along been to invite others to take shares and join the company. On its amalgamation with the Quebec Southern the same effect was obtained as if new shareholders had joined them, for shareholders of the South Shore Company exchanged their shares for shares in the Quebec Southern. Whether outsiders joined the company or not the fiduciary relation of the syndicate remained, for it was a public company, created and operating in the public interest, exercising franchises granted by the Legislature, and subsidized by public authorities. The trust was in favour of the company as constituted from time to time and was not limited to those who happened to be shareholders at the date of the purchase. Reference was made to *Erlanger* v. *New Sombrero Phosphate Co.* (1)

[LORD HALDANE referred to *Waterhouse* v. *Jamieson* (2); *Great North-West Central Railway* v. *Charlesbois*. (3)]

Buckmaster, K.C., J. E. Martin, K.C., and *M. M. Macnaghten*, for the respondent company, were not heard.

(1) (1878) 3 App. Cas. 1218. (2) (1870) L. R. 2 H. L. Sc. 29.
(3) [1899] A. C. 114.

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1911
ATTORNEY-GENERAL FOR CANADA v. STANDARD TRUST COMPANY OF NEW YORK.
1911
May 23.

The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this appeal the question which has to be decided is whether the appellant, the Attorney-General for the Dominion of Canada, can successfully object to a claim by the respondents to be admitted as creditors of the South Shore Railway Company for a sum of $348,000. The material facts of the case are these :

In the year 1893 a railway, extending from St. Lambert, opposite Montreal, to Sorel, a distance of about forty-five miles, had been built, and belonged to the Montreal and Sorel Railway Company. Bonds for 100*l.* each had been issued by the company to the extent of about 1500. The company had become bankrupt and the railway was not being worked. On March 1 in that year Messrs. Tourville, Leduc, Fortier, and Beauchemin agreed to form themselves into a syndicate for the purpose of acquiring the railway and of completing and equipping it and putting it into good condition. They bought up 1453 of the bonds at a price amounting to about 34,000*l.* They also bought up a judgment against the company for a substantial sum, and they spent a good amount of their own money in improving the railway. Under an Act of the Quebec Legislature, assented to on January 8, 1894, a company known as the South Shore Railway Company was incorporated, with power to construct and acquire railways in the locality of the Montreal and Sorel Railway. This Act and the incorporation under it of the South Shore Company were procured by the four members of the syndicate. The whole of the shares in the company in reality belonged to them, and there were no independent shareholders. Each of them subscribed for $75,000 of the company's stock. Along with three other persons, nominees whom they had qualified, they were elected directors, and Mr. Tourville was elected president. On January 16 a meeting of the shareholders was held, at which the directors were authorized to enter into agreements with railway companies and with other persons in accordance with the provisions of the Act. On June 1, 1894, the Montreal and Sorel Railway was sold by the Sheriff of Montreal under a judgment obtained by the Collector of Taxes, and it was bought, at a nominal price of $1600, by

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Mr. Tourville, a member of the syndicate, and the president of the South Shore Company. On June 4, at a meeting of the directors, Mr. Tourville, on the narration that the real value of the railways was represented by the bonds of the Montreal and Sorel Company acquired by the members of the syndicate and by them transferred in part to the South Shore Company in payment for the stock they had subscribed for, agreed to transfer the railway to the South Shore Company at a purchase price to be settled at a later period. The deed of sale to the company from the sheriff was executed on July 7. On October 8, 1895, the directors and their nominees, the only persons interested in the company, fixed the sale price at $648,000, and took credit in their own favour for the $300,000 subscribed by the members of the syndicate and paid in bonds as already stated. This price has not been shewn to be excessive, although it amounted to much more than the syndicate had actually spent in acquiring and improving the railway. The indebtedness of the company, after taking credit for the $300,000 of subscription money, thus amounted to $348,000, and this sum was allocated as an indebtedness of $87,000 to each of the four members of the syndicate, with interest at 6 per cent. A formal agreement to this effect between the members of the syndicate and the South Shore Company was executed on December 2, 1895. These debts were subsequently transferred to the respondents.

In 1902 the South Shore Railway Company was amalgamated with the Quebec Southern Railway Company. In 1904, the companies having become insolvent and having failed to work the railways, the Minister of Railways and Canals for the Dominion of Canada instituted proceedings in the Exchequer Court of Canada, under the provisions of the Canadian statute 3 Edw. 7, c. 21, against the amalgamated companies for a sale. Under the provisions of this and a subsequent statute passed for the purpose, a sale was ordered on September 11, 1905, and the railways were sold for $1,051,000. By a subsequent order it was referred to the referee of the Court to investigate the claims of the creditors of the companies. The respondents put in a claim on the basis above indicated. The Attorney-

General of the Dominion, as an unsecured creditor of the amalgamated railway companies, intervened and contested this claim, as did also the Bank of St. Hyacinthe.

The case put forward by the Attorney-General, the present appellant, and by the bank, was that the proceedings of the members of the syndicate as directors of the South Shore Company, authorizing the purchase of the Montreal and Sorel Railway and the transfer of bonds in payment for the stock subscribed for by the syndicate, was ultra vires and a breach of duty. It was said that Mr. Tourville and his associates in the syndicate were promoters of the South Shore Company and occupied a fiduciary position towards it, and that the resolution of the directors fixing the price of the railway at $648,000 was not binding and that the price was unfair. The respondents' answer was that the price was not in excess of the real value, and that the Attorney-General and the bank had no title to object.

The referee, after hearing evidence and argument, by his final report, dated May 25, 1908, dismissed the case of the Attorney-General and the bank and allowed the claim of the respondents. The Attorney-General and the bank both moved to vary this report, but the Exchequer Court, by order dated October 31, 1908, dismissed the motions. From this order the Attorney-General and the bank both appealed to the Supreme Court of Canada, which, by a judgment dated February 15, 1910, dismissed the appeals, Idington J. dissenting. The Attorney-General alone now appeals to the Privy Council.

The appellant contends, on the footing of being an unsecured creditor of the Quebec Southern Railway Company as amalgamated, that the fund arising from the sale directed by the Exchequer Court ought not to be diminished by admitting the claim of the respondents. He alleges that the price of $648,000 paid in 1894 to the syndicate for the railway was excessive, that the transaction was ultra vires, and that, apart from this, the members of the syndicate, being also directors, were in a fiduciary position towards the South Shore Company, such that the transaction cannot stand. In the view of the case taken by their Lordships, it is not necessary to

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enter into the question whether the price of $648,000 was excessive. The referee, after hearing evidence, decided that it was not, and this finding of fact is not dissented from by any of the judges in the Courts below, except Idington J. But whatever may have been the character of this transaction, it was approved, with full knowledge of the facts, by all of those who owned, or were beneficially interested in, the stock of the company at the time. It, therefore, does not matter, for the purposes of a case such as the present, that these persons were also promoters and vendors. If the transaction had been ultra vires in the sense of being outside the legal capacity of the company, and accordingly not its act, the case would have been different. But, although this has been suggested, their Lordships can find no foundation for the argument. Under the provisions of the statute of the Quebec Legislature incorporating it, the company had power to purchase the Montreal and Sorel Railway, and was authorized to take payment for the amount subscribed for its stock in bonds of any railway company. The transaction was actually carried out in this form, and was on the face of it within the powers conferred by the statute on the company. If, therefore, what the directors did is to be impeached, it must be on the ground, not of its having been ultra vires of the company, but of its having been a breach of duty by the directors. Now, although the capital of the company was $1,000,000, the only stock issued was to the amount of $300,000, and this was taken up and owned by the members of the syndicate and no one else. They and they alone were interested in the capital of the company. This is not a case of winding up, but even if it were, it would make no difference. In proceedings of the character of the present the title of a liquidator as representing creditors cannot be higher than the title of the company against whom the creditors claim. In this case the interests of the company and of the syndicate were identical. The only persons beneficially interested in the company were the four members of the syndicate. The law gave them the complete control of its action. Under that control the company gave effect to the policy of the only persons who had any beneficial interest in its capital. The case

is not one in which the apparent procedure can be said to have been unreal, or to have been a cloak under which a conspiracy to defraud was concealed. Under these circumstances, their Lordships are of opinion that the company, notwithstanding that no general meeting, apart from the meeting of directors, appears to have been held for the purpose, was completely bound by the transactions sought to be impeached, and that the appellant, who has certainly no title higher than that of the company against the assets of which he claims, is bound likewise.

In the course of the argument for the appellant the well-known case of *Erlanger* v. *New Sombrero Phosphate Co.* (1) was much relied on, as shewing that the action of the directors could not stand. It is sufficient to observe that, for the reasons given in the House of Lords in *Salomon* v. *Salomon* (2), the doctrine of the former case has no application to circumstances such as those of the present case, where every one interested in the capital of the company has, with full knowledge, concurred in the act impeached. Their Lordships will humbly advise His Majesty that the appeal should be dismissed.

The costs must be paid by the appellant.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Lawrence Jones & Co.*

(1) 3 App. Cas. 1218. (2) [1897] A. C. 22.

[PRIVY COUNCIL.]

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PERTH GAS COMPANY, LIMITED . . . . APPELLANTS;

AND

MAYOR AND COUNCILLORS OF THE CITY OF PERTH . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WESTERN AUSTRALIA.

Perth Gas Company's Act, 1886, *s.* 50—*Construction—Sale and Purchase of the Undertaking as a Going Concern—Statutory Powers assigned—Calculation of Purchase-money.*

Sect. 50 of the Perth Gas Company's Act of 1886 empowered the respondents "to purchase all the land buildings works hereditaments lamps pipes stock and appurtenances of and belonging to the company in the name and on behalf of the corporation upon giving to the directors six calendar months' notice in writing of such intention so to do and upon such terms and conditions as shall and may be mutually agreed upon between the directors and the corporation," but in case of dispute respecting such purchase arbitration to be resorted to as prescribed "to determine what amount of purchase-money shall be paid."

The Act extended the powers and privileges theretofore possessed by the company, authorizing it to construct and when constructed to own and use works proper and necessary for the manufacture and supply of gas at a prescribed limit as to price; and also conferred upon it all the powers usually conferred upon gas companies, no limit being placed on the amount of their profits, all to be exercised over a vast area of which the city of Perth formed a very small portion. The Act also confirmed all the mortgages and securities already given by the company and made them a valid charge on its property and assets, authorized the increase of its capital and the issue of debentures charged on its undertaking, and sanctioned the purchase thereof by trustees as a due investment of trust moneys:—

Held, that on the true construction of s. 50, in the absence of an express provision to the contrary, the transaction which it contemplates is the sale and transfer with the consent of the incumbrancers to the respondents of the appellants' commercial undertaking as a going concern; not only of the physical apparatus by which they carry on their business, but also of their statutory powers; and that the whole must be included in the calculation of the purchase-money.

APPEAL from a decision of the Supreme Court (May 17, 1910) on a hearing of a special case stated in pursuance of s. 21 of the Arbitration Act, 1895.

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD MERSEY, and LORD ROBSON.

The appellant company was incorporated in Western Australia under the Joint Stock Companies Ordinance, 1858, the respondents being the municipal corporation for the district of Perth within the meaning of the Municipal Corporations Act, 1906.

The company was incorporated with the object of lighting the streets and all public and private buildings and places in the city of Perth by means of gas. It carried on business for some time under the powers contained in its memorandum of association and under 40 Vict. No. 13, 44 Vict. No. 11, and 49 Vict. No. 17; but its powers and privileges were extended and more fully defined by the Perth Gas Company's Act, 1886, which came into operation on October 1, 1886, and was by virtue of s. 57 thereof to be deemed a public Act, and its amendments in 1892 and 1897.

By s. 50 of the principal Act of 1886 it is provided as follows:— "It shall be lawful for the mayor councillors and citizens of the city of Perth if they shall think fit at any time after the 31st day of December 1906 to purchase all the land buildings works hereditaments lamps pipes stock and appurtenances of and belonging to the company in the name and on behalf of the corporation upon giving to the directors six calendar months' notice in writing of such intention so to do and upon such terms and conditions as shall or may be mutually agreed upon between the directors and the corporation but in case of any dispute or disagreement arising between the directors and the corporation respecting such purchase as aforesaid then it shall be lawful for the directors or the corporation if they or either of them shall think fit to require that it shall be left to arbitration to determine what amount of purchase-money shall be paid to the directors . . . ."

On June 17, 1908, the notice prescribed by s. 50 was given to the directors of the appellant company, and a dispute which arose respecting the purchase was referred to arbitration.

In the arbitration proceedings it was contended on behalf of the corporation that in determining the amount of purchase-money the basis of calculation should be merely the value of the buildings, works, hereditaments, lamps, pipes, stock, and appurtenances regarded as being in situ capable of earning a profit, and

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should not include the value of the company's statutory powers and privileges or the amount of profits that have been or can be earned by means of the said property or the exercise of the said powers and privileges in the company's business. The contrary contention on behalf of the company was that in determining the amount of purchase-money the basis of calculation should include (*a*) the value of the company's statutory powers and privileges and (*b*) the amount of profits that have been and can be earned by means of the said property and the exercise of the said powers and privileges in the business of the company.

The special case submitted for the opinion of the Supreme Court the question which of the above-mentioned contentions was right; and, further, if the Supreme Court was of opinion that neither of the said contentions was right, then upon what basis was the purchase-money to be calculated.

The Supreme Court decided in favour of the corporation that in determining the amount of purchase-money the basis of calculation should be as claimed on its behalf.

Sir R. Finlay, K.C., *Draper, K.C.*, and *Whinney*, for the appellants, contended that this decision was erroneous and that the corporation must pay to them the commercial value of the property purchased as a going concern. Sect. 50 of the Act of 1886 must be construed in reference to all the provisions of the Act so as to arrive at the true intention of the Legislature in giving to the respondents a power to purchase. Various charges on the appellants' property are created or confirmed by the Act and the construction of s. 50 adopted by the Supreme Court destroys their value. The Act does not in express terms provide that the purchase-money should be calculated on the basis put forward by the respondents. In the absence of such a provision that construction should be adopted which is consistent with honesty and does not result in the confiscation of incumbrances which had been authorized by the Act. On a consideration of the whole Act s. 50 must be construed so as to include the transfer to the respondents of all the rights, powers, and privileges which the appellants possess under their Acts. They are covered by the words in the section "works," "hereditaments,"

and "appurtenances." The rights so transferred should be included in the valuation. Without those rights the property would be of little value, and in order to discharge the duties hitherto performed by the company the respondents must contemplate the grant thereof to them by the Legislature to the prejudice of the appellants. Moreover the respondents will acquire by their purchase the exclusive right to supply gas over an extensive area outside their own municipal limits. Reference was made to *Edinburgh Street Tramways Co.* v. *Lord Provost, &c., of Edinburgh* (1); *London Street Tramways Co.* v. *London County Council* (2); *In re Kirkleatham Local Board and Stockton and Middlesbrough Water Board.* (3)

P. Ogden Lawrence, K.C., and *J. A. Northmore*, for the respondents, contended that the appellant company's statutory powers and privileges were not included in the transfer. The respondents did not purchase the undertaking and were not bound to do so. Statutory powers and privileges under an Act are not saleable or transferable. The appellants had only a personal and non-assignable licence. Sect. 50 cannot be construed as entitling the appellants to be paid for that which it could not assign. By the transfer the appellants lose their statutory powers and privileges as no longer applicable or capable of being used. But under s. 50 the respondents are only bound to pay for what they purchase, not to compensate the appellants for an indirect and resulting loss. They contended that the respondents would derive the necessary powers and privileges not from a sale by the appellants, but by an implied grant by the Legislature, implied from the nature and terms of the transaction authorized by the section. Or they might seek thereafter a direct grant thereof. With regard to the powers being included in the enumeration of things authorized to be purchased it was contended that the words relied on had no such meaning. "Works," for instance, could not have a wider meaning than gas works as defined by s. 2 of the Act of 1886, a definition which is more limited in its scope than that of "undertaking" contained in the same section. The amount of purchase-money must depend upon the words of

(1) [1894] A. C. 456. (2) [1894] A. C. 489.
(3) [1893] 1 Q. B. 375; [1893] A. C. 444.

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s. 50, which only authorize the sale and purchase of the physical structure apart from the goodwill and do not contemplate the transfer of the undertaking or of any statutory powers.

Counsel for the appellants were not heard in reply.

The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Supreme Court of Western Australia, dated May 17, 1910, on a question submitted under the 21st section of the Arbitration Act of 1895, by way of special case for the opinion of that Court.

The case was stated by two arbitrators and an umpire appointed under the 50th section of the Perth Gas Company's Act of 1886 to fix the amount of the purchase-money of the thing sold by the directors of the appellant company to the respondents, in pursuance of the provisions of that section. The question for decision in effect resolves itself in this. What was the thing sold? Was it the whole undertaking of the appellant company, or merely all the local works, pipes, and other physical things by means of which they carried on their business? The answer to this question depends upon the construction of this 50th section. The section would appear not to have formed part of the statute, as originally drafted, in which it is found. No reference is made to it in the preamble or the other part of the statute. It would seem to have been inserted as an afterthought without any attempt having been made to reconcile its provisions with those of the other sections of the Act, or with the general principles of the law affecting incorporated joint stock companies.

Hence the difficulty of putting any meaning, consistent with common sense and justice, on its inapt and ambiguous language. In order to solve that difficulty it is necessary to consider some of the other provisions of the Act.

From the preamble it appears that the company had been incorporated under the Joint Stock Companies Ordinance of 1858; that before the passing of the Act of 1886 it had issued 12,907 shares upon which 1*l.* per share had been paid up; that it had become seised and possessed of certain freehold lands situated in Perth; that it had erected gas works and other buildings upon these lands or portions of them, and had used these

works and buildings for the purposes of its undertaking; that the value of its property and plant was estimated at 16,000*l.*; and that it had for the purposes of its undertaking borrowed certain moneys upon mortgage of these lands and hereditaments and on the bond of the company, which securities were then in force. It is then recited that it would be of public and local advantage and utility, and also to the advantage of the company, if its existing powers under the above-mentioned Ordinance and its articles of association were extended and more fully defined, and that it was expedient to confer upon the company the further powers and privileges thereinafter set forth.

By s. 2, sub-s. (*k*), the expression "gas works" is most strangely defined to be "the gas works and all other works connected therewith by this Act or in any other way authorized to be constructed." And by sub-s. (*g*) of the same section the expression "undertaking" is defined to mean "the making and supply of gas within the limits herein mentioned, and the making and constructing gas works for that purpose, with proper works and conveniences and apparatus connected therewith, and all other works by this Act authorized to be executed, and the doing of all things necessary or convenient for the purpose, subject to the provisions of this Act or the general Act."

This definition means little more than the right and power to construct, and when constructed to own and use, the works proper and necessary for the manufacture and supply of gas throughout the area defined by the Act within the limit prescribed as to price for profit and gain as a commercial undertaking. These limits are that the maximum price charged to private consumers shall not exceed 1*l.* per 1000 cubic feet, and that in the absence of any special contract the price charged the local authority shall be 10 per cent. less than that charged for the time being to private consumers; while the area to be supplied is by s. 3 fixed so as to include not only the city of Perth itself, over which the jurisdiction of the respondents alone extends, but in addition every place within a circle of five miles from the General Post Office in that city.

From the map produced, and by consent used upon the

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hearing before their Lordships, it appears that the city of Perth at the date of this statute formed but a very small portion indeed of this very extended area. Within this area the company are empowered, in order to construct works, to break up the soil of streets and roads, to open and break into all sewers and conduits underneath, to lay pipes, and, in short, to do all such other acts and things as it might deem necessary for supplying the inhabitants within the above-mentioned area with gas, and further to supply the gas upon such terms as might be agreed upon between the company and the persons supplied, and also to sell and dispose of the coke and residuum arising from the materials used in manufacturing gas in such manner as the company may think proper. All gas tar or ammoniacal liquor created in the process of manufacturing gas is to be kept in covered tanks. The company are no doubt prohibited from laying down or placing " any pipe or other work into, through, or against any building, or in any land not dedicated to public use without the consent of the owner " thereof; and they are also bound to serve upon the local authority notice of their intention to break up a street; the work too must be carried out and the street or road reinstated under the supervision of that authority; but outside these usual and proper restrictions the company were clothed with all the powers usually conferred upon gas companies, and no limit whatever was placed upon the amount of their profits.

That it was anticipated that these profits would be considerable is evident from the financial powers conferred upon the company. By s. 11 they are empowered to increase their capital by the issue of new shares up to 60,000*l*. By s. 6 they are empowered to borrow, either by way of mortgage of the whole or any part of the assets of the company or by bonds or debentures or in such manner as they may think fit, sums up to 66,000*l*.

The mortgages and other securities theretofore given by the company are declared to be good and effectual, and the moneys thereby secured are made a valid charge upon the property and assets of the company, anything in the general Act or articles of association to the contrary notwithstanding; and all moneys borrowed, or to be borrowed, are to be applied only to carry

into execution the objects and purposes of the company's undertaking. By s. 8 it is enacted that debentures issued under the authority of the statute shall be in the form set forth in the schedule. That form makes the principal mentioned in the debenture and the interest thereon a charge upon "the undertaking, rates, and other revenues of the Perth Gas Company"; and s. 7 prescribes that "no dividend shall be declared or profits divided amongst the shareholders of the company until all interest previously accrued on such debentures so issued shall have been paid, or a sufficient sum set apart and made available for the payment thereof." While, most important of all, s. 10 enacts that it shall be lawful for any executor, administrator, or trustee, having the duty of investing any trust moneys, unless and not expressly or impliedly prohibited by the instrument creating the trust, to purchase with or out of such moneys any debentures issued by the company under the authority of the Act, and declares that "every such purchase shall be deemed a due investment of such trust moneys."

It was conceded in the argument addressed to their Lordships on behalf of the respondents that in the year 1886, and from thence up to the commencement of the proceedings out of which this appeal has arisen, the only powers conferred upon the respondents in reference to the manufacture or use of gas independently of this statute and those amending it were the powers conferred by the statutes 40 Vict. No. 13, 44 Vict. No. 11, and 49 Vict. No. 17; and it is not disputed that these latter are confined to the power to light the streets, thoroughfares, and public places within the limits of their own municipality.

On June 17, 1908, the respondents gave to the directors of the company the notice in writing contemplated by s. 50 of the Act of their intention to purchase at the expiration of six months therefrom all the land, buildings, works, hereditaments, lamps, pipes, stock, and appurtenances of and belonging to "the company."

A dispute having arisen between the directors and the Corporation of Perth respecting the purchase, it was referred, as provided in the section, to two arbitrators and an umpire to

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fix the amount of the purchase-money, the only matter they had authority or jurisdiction to determine.

In the course of the arbitration the question arose as to the basis upon which the purchase-money should be calculated, namely, whether it should be fixed as the value of the physical property of the company mentioned in the notice treated as things in situ and capable of earning a profit, or should be fixed as the value of these things plus the value of the statutory powers of the company, to use them as the company had theretofore used them, or were entitled to use them, to make a profit thereby, or in other words whether they were to treat the thing purchased as a going commercial concern, with all its assets and powers, and to fix the purchase-money accordingly.

McMillan J. answered the question asked in the case stated by the arbitrators to the effect that the proper basis on which the purchase-money was to be calculated was that first mentioned, namely, the value of the physical subjects of property regarded in situ as capable of earning a profit. He appears to have based his decision on the judgment of the Court of Appeal in the case of *In re Kirkleatham Local Board and the Stockton and Middlesbrough Water Board* (1), a case which, in their Lordships' view, is wholly different from the present, and the decision in which is inapplicable to the present. In that case a certain public body, a joint water board, not at all a commercial company trading for gain, was empowered to construct works to improve the water supply in the boroughs of Stockton and Middlesbrough and also in certain outlying districts, including Kirkleatham amongst others.

By s. 4 of the Stockton and Middlesbrough Waterworks Act of 1876 it was provided that this board should, when required by the sanitary authority of any district beyond the boundaries of these boroughs, sell to such authority all mains, pipes, and fittings belonging to the board within that district other than and except any mains, pipes, or fittings used for service beyond the limits of that district at a price to be fixed by arbitration. The Kirkleatham Local Board required the joint board to sell to them the mains, pipes, and fittings belonging to the joint

(1) [1893] 1 Q. B. 375.

board situate within the former's district which were used exclusively for the service of that district. The arbitrators in fixing the purchase price took into account the loss by the joint board of the revenue derived by them from the works so purchased. It was held that in this the arbitrator was wrong, and that the price to be ascertained was the reasonable price of the mains, pipes, and fittings regarded as apparatus fixed in the ground and capable of earning a profit, but without any compensation to the joint board for the loss of the right to supply water to the Kirkleatham district.

It is to be observed that it was only portion of the mains, pipes, and fittings belonging to the board situated within the Kirkleatham district which were purchased, namely, that portion exclusively devoted to the supply of that district. It therefore could not for a moment be suggested that the whole undertaking of the joint board in that district was purchased by the local board, but notwithstanding this Lindley L.J. is at p. 383 reported to have used these words: "In considering their (i.e., the joint board's) rights as between themselves and the Kirkleatham Local Board, it is important to bear in mind that the vendors were not ordinary owners of a going concern, but were only invested with statutory powers to be exercised in certain conditions." And again at p. 384 he says: "I am not surprised that the arbitrator went wrong, for if you look at the joint board as ordinary vendors, as vendors of a water supplying business, it would be hard to deprive them of compensation, but the arbitrator has gone wrong in not realizing who the vendors were, and in not seeing that they were a mere statutory authority acquiring this property and this right upon terms fixed by the Act of Parliament, which terms were not intended to give them any right to compensation for the loss of the profit which they made in supplying the district." Bowen L.J. appears to have concurred in this judgment.

In the present case not only are the words of s. 50 much wider and more general in character than those of the section with which Lindley L.J. had to deal, but, in addition, the provisions of the statute of 1886 place the appellant company in a position altogether dissimilar from that of the joint board, as described

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by him. The company is a commercial body carrying on a gas supplying business for profit. They are empowered, if indeed not bound, by the exigencies of that business, to enter into contracts for the supply of gas to the inhabitants of the vast area over which the respondents have no jurisdiction or control whatever. They are entitled in order to secure the repayment of trust moneys lent to them by executors, administrators, and trustees to charge their profits and their powers as well as their plant and physical assets, their whole undertaking, with the amount of such loans. With all respect to the learned judge, McMillan J., he does not seem to have given any consideration to many of the consequences to which his decision necessarily leads. He does not allude to the position of the debenture-holders or to that of the other creditors of the company, or, indeed, to a great extent to that of the company itself when all its physical equipment for carrying on its business shall have been acquired by the council. He does not indicate whether, in his opinion, it is dissolved or continues to exist. He admits that its statutory powers are probably the most valuable part of its assets, but holds that these are not purchased by the corporation, and that no compensation is to be paid for the loss of them. He recognizes clearly that it could not be rationally supposed that the Legislature which passed this measure could ever have intended anything so grotesque as that the council should purchase the works designed to supply this wide district and yet not have any power to use them for supplying gas outside the narrow limits of their own municipality, and only the power to use it within that limit to a very limited extent. He seems to have seen clearly that to avoid such an absurd result the corporation must be held to have obtained from some source statutory powers to use these works and apparatus similar, in some degree, to those conferred upon the company, and he came to the conclusion that, notwithstanding the statutory assurance given to the debenture-holders that these debentures were securities in which trustees might lawfully, and presumably safely, invest trust funds, the statutory powers necessary to enable the company to carry on the business were only given to it until the corporation chose to exercise its option, that they were not transferred from

this company to the corporation but ceased to exist, and that similar powers were upon the sale by implication granted by the Legislature to the latter body. The statute admittedly contains no express provision to this effect as did the statutes under consideration in the *Edinburgh* and *London Street Tramway Cases* (1); nor any provision such as they contained to the effect that no allowance should be made for any past or future profits of the undertaking. Nor again does this statute expressly or by implication provide for the winding-up of the company, the application of the purchase-money to be paid by the corporation, the collection of the debts due to the company, or the release or discharge of its obligations. All these things are left in obscurity. It was urged in argument that the purchase-money to be paid by the corporation was sufficient in amount to discharge the debenture debt, and might be so applied, but for all that it appears these debentures may have been made redeemable at a date not yet arrived; in which case the debenture-holders might decline to accept payment. It is obvious that a construction of this s. 50 which would inflict upon the shareholders and secured creditors of the company such an injustice as is involved in the destruction of what may be its most valuable asset—its statutory powers—ought not to be adopted, unless it is the only construction of which the section is reasonably susceptible. And it appears to their Lordships that there is only one construction which would at once obviate that injustice, and meet to a large extent the difficulties already indicated. That construction is this, that the transaction which the section contemplates and authorizes is the sale and transfer to the corporation of the commercial undertaking of the company as a going concern; not only the physical apparatus by which they carry on their business, but their powers to use that apparatus for the purposes of carrying it on. The question, therefore, is whether the section taken in connection with the other provisions of the statute is or is not reasonably susceptible of such a construction.

The wording of the section is somewhat peculiar. The subjects of the sale are expressed to be "all the land, buildings, works, hereditaments, lamps, pipes, stock, and appurtenances

(1) [1894] A. C. 456 and 489.

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of and belonging to the company." If the word "works" be taken to indicate physical things alone, then there is obviously a redundancy of expression in the section, for buildings are undoubtedly "works," as also are pipes and conduits over or under ground. The amount of the purchase-money may in the absence of agreement between the parties be settled by arbitration, but the special peculiarity of the section is this, that while it empowers the respondents to buy, it does not expressly oblige the company to sell, and, moreover, it leaves all the other terms and conditions of the sale to be settled by mutual agreement between the two contracting parties, and by that method alone. It provides, no doubt, that if any dispute or disagreement should arise, which might not, however, be a dispute or disagreement touching the price at all, but touching some other term or condition of the contract, the parties or either of them may, if they think fit, require that it be referred to arbitration to determine, not the matter in dispute, but the amount of the purchase-money, upon which matter alone is the determination of the arbitrators binding on the parties. It may possibly be that if the amount of the purchase-money was the only matter in dispute between the parties the company could not refuse to carry out the sale after the arbitrators had determined that question, but if the company should, for instance, insist that their pending contracts with their customers should be carried out by the council, and the latter refused to yield on this point, then it appears to their Lordships to be clear that the directors could not be compelled to carry out the sale. It is needless to point out that neither in the *Kirkleatham Case* (1) nor in any other of the cases to which they have been referred were the provisions of the enactment under consideration at all similar in this respect to those of s. 50.

There is no way of getting rid of the charge of the debenture-holders upon the assets of the company sold under s. 50 save by their concurrence in the sale. The directors have clearly the right to refuse to carry out the sale unless they do concur, and having that right, it is their duty to those

(1) [1893] 1 Q. B. 375.

incumbrancers, whose trustees the directors in a certain sense are, to exercise it. There appears little doubt that debenture-holders could by law restrain the directors from completing, against their will, a transaction which would diminish so vastly the value of the debentures they hold. The directors, like every other incumbered vendor, would be bound, in the absence of agreement to the contrary, to convey to the purchaser the property sold free from incumbrances. All these considerations, in their Lordships' opinion, go to shew that what the statute contemplated was the sale of the whole undertaking, the whole subject charged, carried out with the consent of the incumbrancers, whose claims would then attach to the money which represented the entire property. There are no words in s. 50 which in their Lordships' view prohibit such a transaction. It is the only just and the only workable one. Every other is beset with difficulties almost, if not altogether, insurmountable. Moreover, when a statute authorizes the sale of such things as the physical land, buildings, apparatus, and equipment of such a body as a gas company, things which are comparatively worthless to the purchaser, unless with them he acquires the statutory powers to use them which the vendors enjoyed, the reasonable conclusion to be drawn in the absence of an express provision dealing with the matter would appear, prima facie, to be that the sale of the physical things carried with it to the purchaser the right and power to use them as the vendor had used them, and that this right and power were part of the subject sold. They are therefore of opinion that the judgment appealed from is wrong and should be reversed, and that the proper answer which should be given to the question put by the arbitrators in the special case is that the contention of the company as there set forth was right. And they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appeal.

Solicitors for appellants: *Sutton, Ommanney & Rendall.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

J. C.* [1911 May 5; June 28.]

LOUIS A. LAPOINTE AND OTHERS . . . . DEFENDANTS;

AND

HENRI LARIN . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Montreal City Charter (62 *Vict. c.* 58), *s.* 14, *art.* 338 — *Construction* — *Penalties.*

Art. 338 of the Montreal City Charter (62 Vict. c. 58) provides "that every member of the council who . . . . authorizes any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee" shall incur the penalties inflicted by the judgment under appeal. The appellants, being the finance committee of the council, acting under the instructions of the council, authorized the expenditure required to defray the cost of the city's representation by its mayor at the Paris fêtes. At the time when provision was made to defray this cost, the appropriation prescribed by art. 334 had been duly voted and the required funds were available and legally at the disposal of the city. A dissenting ratepayer sued the appellants under art. 338:—

Held, that the appellants had not contravened art. 338 in any respect. The case was not one of unauthorized expenditure by them. It was expenditure under the authority of the council, and even if there had been some irregularity in procedure, which was by no means clear, it could not justify the infliction of penalties attached by art. 338 to acts and defaults of a very different description.

APPEAL by special leave from a judgment of the Supreme Court (December 24, 1909).

The appellants, seven in number, were in the year 1908 members of the council of the city of Montreal, and constituted, by election of the council, the finance committee of the said council. The respondent was a ratepayer in that city.

In December, 1907, in accordance with Act 62 Vict. c. 58, which constitutes the charter of the city of Montreal, the sums of money at the disposal of the council out of the revenues of the city were appropriated to the needs of the various civic departments for the ensuing fiscal year; and a reserve fund, also

* *Present:* VISCOUNT HALDANE, LORD MACNAGHTEN, LORD MERSEY, and LORD ROBSON.

in accordance with the Act, was set apart to meet certain of the expenses of the council, which included, among others, the cost of representation and of delegations authorized by the council.

On May 18, 1908, the council unanimously resolved that the mayor and his secretary should represent Montreal at certain Paris fêtes connected with the tercentenary of the founding of Quebec and instructed the finance committee to provide funds for his travelling expenses. Payments were made in obedience to this resolution out of the reserve fund.

In November, 1908, the respondent sued the appellants under art. 338 of the charter, praying that the appellants should repay with interest to the city the sums paid, and that they should each pay a fine and be unseated and disqualified for two years from acting as members of the council.

It was alleged that the resolution of May 18, 1908, was illegal because the council (1.) authorized expenditure before a certificate was produced by the comptroller, declaring that there were funds available to meet it; (2.) recommended expenditure without previously submitting such recommendation to the finance committee and obtaining its approval; (3.) voted expenditure without determining its amount.

The appellants denied the allegations of the respondent and pleaded that it was not necessary for them to have the resolution of May 18, 1908, previously submitted to the finance committee, that the resolution was supported by a certificate of the comptroller, and that no specific amount having been voted they had not exceeded it.

The trial judge dismissed the action, holding that the defendants had not contravened art. 338. The object of that article was to ensure compliance with art. 334 that in its annual appropriations the council should not expend in excess of its revenue.

The majority of the Court of review held that the resolution of May 18, 1908, was illegal substantially on the grounds alleged by the respondent, in whose favour they decreed.

The Court of King's Bench (Appeal side) reversed this decision and restored the judgment of the trial judge.

The Supreme Court (Fitzpatrick C.J. and Girouard J.

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dissenting) restored the judgment of the Court of review, the result being that the appellants were disqualified for two years and condemned to pay to the city $3809 with costs.

The majority held that under art. 42 of the charter "the plan outlined is clearly and expressly that in the finance committee and therein alone can lawfully be formulated any authorization involving the expenditure of money." The certificate given was not the certificate of art. 336, which was necessary to render valid the resolution of May 18, 1908. As to the reserve fund, it was not an appropriated one and needed all the formalities of arts. 42 and 336.

Art. 42, which was principally relied upon as adverse to the appellants, is as follows :—

"The functions of the finance committee shall be:

"The preparation of the annual estimates of expenditure;

"The consideration of all recommendations involving the expenditure of money, and the awarding of all contracts, subject to ratification by the council, for works, materials and supplies, unless an appropriation has been already voted.

"No recommendation for such purpose shall be adopted by the council unless the same shall have been previously submitted to and sanctioned by the finance committee; provided however that, upon the refusal of the finance committee to sanction an appropriation asked for by any committee, the council may, by a vote of the absolute majority of all its members, order such appropriation to be made.

"No member of any other permanent committee can be a member of the finance committee."

The dissentient judges considered that all the formalities had been observed, otherwise art. 338 did not apply because no real injustice had been done and the appellants had acted in good faith; the Chief Justice observing, with regard to the construction of art. 338 which had been adopted by the majority, that it "would be to make the members of the council insurers not only of the honesty and efficiency, but of the infallibility of the municipal officials. Of the fourteen judges who have heard this case, nine say that the necessary formalities have been complied with, and five that the proceedings were irregular; and,

as a result, seven men, admitted to be of the most trustworthy, are disqualified for a period of two years and condemned to pay a large sum. Are these gentlemen presumed to be endowed with that grace of infallibility which evidently has been denied the Courts of this country?"

Atwater, K.C., Geoffrion, K.C., and *G. Lawrence,* for the appellants, contended that the decree of the Supreme Court should be reversed. On the evidence all the formalities required by the city charter had been complied with. There was a certificate of the comptroller that the moneys were available, there being a reserve fund, previously voted and legally placed at the disposal of the council. Art. 338 (which is quite distinct from art. 42 and is not referred to in it) on its true construction applies to the authorization of expenditure beyond the amount placed at the council's disposal. The council authorized the payment and it was not in excess of its funds in hand, over which its power of disposition was supreme. Art. 338 is of a highly penal character and cannot be applied to a case which is not within either the spirit or the letter of the city charter. The judgments adverse to the appellants recognize their good faith, that no injustice has been done to the city or its interest, but are founded on informalities which even if proved do not entail the consequences imposed by the article.

Rodier, for the respondent, contended that it was necessary for the council to obtain the recommendation of the finance committee before adopting the resolution of May 18, 1908. It had not done so. Neither had it obtained a comptroller's certificate, the only certificate alleged being on the warrant for payment. It did not vote a fixed amount. It paid the unauthorized expenses of the mayor's trip to Europe, and paid the amount demanded by his secretary, without obtaining the mayor's approval of that amount. The resolution had no legal validity because it was not accompanied by the comptroller's certificate as required by art. 336. At the time of passing the resolution there had been no appropriation of the sum voted, in the sense that the purpose and amount of the expenditure had not been defined. The appellants exceeded the amount voted by the council, for

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no amount had been fixed. They accordingly infringed art. 338 in that they authorized expenditure exceeding the amount previously voted and legally placed at their disposal.

Atwater, K.C., replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from the Supreme Court, Canada.

The question at issue lies in a very narrow compass, but it has given rise to a singular divergence of judicial opinion. The trial judge dismissed the plaintiff's action with costs. The Court of review by a majority of two judges to one reversed the decision of the trial judge and gave judgment for the plaintiff. The Court of Appeal for Quebec, consisting of five judges, unanimously overruled the Court of review and restored the judgment of the trial judge. And lastly the Supreme Court, by a majority of three to two, reversed the judgment of the Court of Appeal and restored the judgment of the Court of review. The result is that the defendants, who constituted the finance committee of the Montreal City Council, have been deprived of office, condemned jointly and severally to pay the sum of $3809.40, and disqualified for re-election as aldermen for the period of two years.

No charge of corruption or personal misconduct of any sort is made against the defendants or any of them. The charge is that they acted in contravention of art. 338 of the city charter, 62 Vict. c. 58, which declares that "every member of the council who authorizes . . . . any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee" shall incur the penalties which have been inflicted by the judgment under appeal. Have the defendants contravened art. 338 or have they not? That is the subject on which there has been so much difference of opinion in Canada. The question has been litigated in four Courts. Nine judges have held that the charge is not well-founded. Five judges, including a majority of the judges of the Supreme Court, have taken the opposite view. And their view has prevailed.

The facts which gave rise to the present controversy are these: On May 18, 1908, at a special meeting of the council, at which the mayor and forty aldermen, constituting very nearly the whole body of the council, were present, there was read a letter from the Comité Dupleix of Paris, inviting the city of Montreal to send representatives to the celebration of the tercentenary of the foundation of the city of Quebec. A resolution was unanimously adopted accepting the invitation, requesting the mayor with his secretary in attendance to represent the city of Montreal, and instructing the finance committee to place the requisite funds at the mayor's disposal. On May 20 a formal acceptance was sent to the secretary of the Comité Dupleix. On the 26th the city comptroller was requested by the mayor to place at his disposal $1500 for travelling expenses. On the 29th the comptroller laid the mayor's letter before the finance committee. The finance committee passed a resolution instructing the city treasurer to comply with the request and to advance the sum required. On May 30 the city treasurer certified the amount as correct and recommended that it should be paid. The proposed payment was approved by the finance committee, subject to the certificate of the city comptroller that there were sufficient available funds voted by the council for the purpose. The comptroller gave his certificate to that effect, and thereupon the sum of $1500 was paid to the mayor.

The mayor, accompanied by his secretary, went to France in compliance with the resolution of the council. On his return an account for the balance of the travelling expenses of the mayor and his secretary was filed with the comptroller. It was passed and paid with all the formalities observed in the case of the previous payment.

It is not denied that the defendants as members of the finance committee, acting under the instructions of the council, authorized the expenditure required to defray the cost of the representation of the city of Montreal at the Paris fêtes. Expenditure for such a purpose is within the powers of the council, provided the requirements of the charter are duly complied with. The only question, therefore, seems to be, Was the expenditure in question in the present case in excess of the

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amount previously voted and legally placed at the disposal of the council?

The action of the council in the matter of finance is governed by the provisions of the charter as amended by subsequent legislation. Those provisions are contained in s. 14, headed Finance, which comprises arts. 332—442, both inclusive.

Art. 332 provides that the civic fiscal year shall begin on the 1st day of January and terminate on the last day of December of each year.

Art. 333 deals with the disposal of capital amounts.

Art. 334, as originally enacted, was in the following words:—"In the month of December of each year the council shall appropriate the sums at its disposal out of the revenues of the city for the needs of the various civic departments during the ensuing fiscal year.

"In so doing the council shall maintain the equilibrium between the revenues and expenses, and provide for—

"(*a*) The cost of the collection of the civic revenue.

"(*b*) The interest upon the civic debt and any sinking fund which may be established.

"(*c*) The school tax.

"(*d*) A reserve of 5 per cent. for such unforeseen expenses as judgments, epidemics, inundations, and damages caused by irresistible force.

"(*e*) Other established charges upon the civic revenue, including the deficit from any previous year.

"(*f*) Repairs, maintenance, salaries, and general administration."

By 3 Edw. 7, c. 62, that article was replaced by an article in which there are one or two slight verbal alterations, and sub-s. (*d*) reappears in the following words:—"(*d*) A reserve of 5 per cent.—2 per cent. being to cover all possible loss in the collection of taxes, and 3 per cent. for unforeseen expenses, such as those relating to judgments, official receptions, epidemics, inundations, fortuitous events, and damages caused by irresistible force."

By 7 Edw. 7, c. 63, s. 12 (1907), the following article was inserted after art. 334:—"334b. The city may charge against

the reserve fund the cost of representation and of delegations authorized by the council as well as the sums required for the settlement of claims and for the removal of snow and ice from the side walks.

"The city may contribute to an amount not exceeding $15,000 towards the maintenance of a technical school at Montreal and charge such amount against the reserve fund each year."

Art. 335 as replaced by 3 Edw. 7, c. 63, s. 28, so far as material, is in the following terms:—

"The amount so set aside shall never exceed the amount of the revenue from all sources for the ensuing year.

. . . . .

"No amount appropriated can be varied or applied to any other purpose unless such change in the appropriation or question is approved by a vote of an absolute majority of all the members of the council."

The following articles are also material:—

"Article 336. No resolution of the council or of any committee authorizing the expenditure of any money shall be adopted or have any effect until a certificate of the comptroller is produced establishing that there are funds available and at the disposal of the city for the service and purposes for which such expenditure is proposed in accordance with the provisions of this charter.

"Article 337. No contract or agreement whatever shall be binding upon the city unless it has been approved by the council.

. . . . .

"Article 338. Every member of the council who authorizes either verbally by writing by his vote or tacitly any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee shall be held personally liable therefor, and shall thereby become disqualified as a member of the council and shall also be disqualified for re-election as alderman for a period of two years thereafter.

"Article 339. The city treasurer shall prepare and publish

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every year, before the 1st of April in each year, a report showing:—

"(*a*) The balance of moneys in hand and in banks at the beginning of the year; the receipts from each department, and the proceeds of every loan, whether temporary or permanent;

"(*b*) The disbursements made by each department as well as the repayment of all loans, whether temporary or permanent.

"The city treasurer shall be personally responsible for every sum of money which he may pay, knowing that such payment exceeds the amount voted by the council for the purpose."

It is not disputed that the Budget resolutions for the year 1908 were duly passed in December, 1907, and that the appropriations prescribed by art. 334 were duly voted, and also that at the time provision was made for the expenses of the representation of the city at the Paris fêtes there were funds available and legally at the disposal of the city for purposes which included the cost of representation and delegations authorized by the council.

Now it seems tolerably plain that art. 338 contemplates two distinct cases—the case of expenditure of money by the council in excess of the amount appropriated by the Budget resolutions, and expenditure by a committee in excess of the amount placed at the disposal of such committee by a special vote of the council. The difficulty, such as it is, seems to have arisen principally from confusing the two cases. The confusion runs through the whole of the argument on the part of the respondent. The case under discussion is not a case of unauthorized expenditure by a committee. It is a case of expenditure by the council itself, or, what is the same thing, expenditure under the instructions of the council carried into effect through the proper channel, that is the finance committee. It may be that there has been some departure from ordinary routine or some failure to comply with the provisions of art. 42, which deals with the functions of the finance committee, or some infraction of a by-law of the council. But no error of that sort, if there has been any error, which is by no means clear, can justify the infliction of penalties attached by art. 338 to acts and defaults of a very different description.

Agreeing with Sir Charles Fitzpatrick C.J., their Lordships are

of opinion that the defendants have not contravened art. 338 in any respect, and they think that the action ought to have been dismissed with costs.

Their Lordships will therefore humbly advise His Majesty that the judgment appealed from should be reversed and the action dismissed with costs both here and below, and that any costs paid under the order of the Court of review or under the order of the Supreme Court should be repaid.

Solicitors for appellants: *Blake & Redden.*
Solicitors for respondent: *Lawrence Jones & Co.*

[HOUSE OF LORDS.]

THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED . . . } APPELLANTS;

AND

"GUNFORD" SHIP COMPANY, LIMITED, AND ANOTHER . . . . . } RESPONDENTS.

SOUTHERN MARINE MUTUAL INSURANCE ASSOCIATION, LIMITED . . . } APPELLANTS;

AND

"GUNFORD" SHIP COMPANY, LIMITED, AND ANOTHER . . . . . } RESPONDENTS.

Insurance (Marine)—Non-disclosure to Insurer of Material Facts—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 17, 18, 19, 33, 39.

By s. 18 of the Marine Insurance Act, 1906, "(1.) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured. . . . . If the assured fails to make such disclosure, the insurer may avoid the contract; (2.) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk"; and by s. 19, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer every material circumstance which is known to himself.

Shipowners brought an action to recover for a total loss under

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policies of insurance on the hull of the ship during a specified voyage. The insurances were effected through the agency of the managing owner of the vessel. It appeared that twenty-two years had elapsed since the master of the vessel had been at sea, he having during that time been engaged as a stevedore; that he had lost his last ship and his certificate had been suspended; that the hull was largely over-insured, having regard to its market value, and that there were insurances on gross freight and disbursements. With regard to part of these disbursements there was no insurable interest and the insurance was effected by a p p.i. or "honour policy." The managing owner, to whom money was due from the ship, had also taken out for his own protection "honour policies" to a large amount on disbursements:—

Held, first (Lord Shaw of Dunfermline doubting), affirming the decisions of the Court of Session, that there was no duty on the part of the owners to inform the insurers of the past history of the master, and that the omission to disclose the circumstances relating to his career did not constitute the non-disclosure of a material circumstance; but secondly, reversing the decisions of the Court of Session, that the omission to disclose the facts relating to the over-insurance of the vessel and the existence and amount of the honour policies did amount to the non-disclosure of material circumstances, and that the contract of insurance was voidable by the insurers.

APPEALS from decisions of the First Division of the Court of Session, Scotland. (1)

The facts and arguments of counsel are set out in the opinions of the Law Lords.

May 2, 11, 12. *Leslie Scott, K.C.*, and *F. D. Mackinnon* were heard for the appellants.

J. A. Clyde, K.C., and *Charles D. Murray, K.C.* (both of the Scottish Bar), were heard for the respondents.

The House took time for consideration.

1911. June 28. LORD LOREBURN L.C. My Lords, the facts of this case have been exhaustively considered in the opinion about to be delivered by the Lord Chief Justice which I have had the advantage of reading, and I need not therefore recapitulate them. I agree with the First Division in thinking that there was no breach of the warranty of seaworthiness, and that there was no concealment of material facts in regard to the qualifications and career of the master.

There is, however, one further ground of defence, namely, the

(1) 1910 S. C. 1072.

non-disclosure of material facts as to other insurances effected upon hull, freight, and disbursements. Upon this point I am constrained to differ from the First Division with much reluctance because of its great authority. No actual circumstance is in dispute affecting this point, but the question is what ought to be the conclusion of fact. Were the circumstances which the assured or his agent failed to disclose material in the sense described by the statute?

Now, my Lords, it is common ground that owners and agent between them (for I cannot discriminate) effected policies upon her hull, freight, and disbursements for 35,600*l.*, apart from master's effects valued at 200*l.* If the insurances be split up they were as follows: Upon hull, 19,000*l.*; on freight, 5500*l.*; the freight for the voyage being about 4800*l.*, of which one half had been paid in advance and was not at risk; on disbursements 4600*l.*, and additional on hull and disbursements (including debts of ship to her managing owners and others) against total loss, 6500*l.*

The actual value of the hull was about 9000*l.* No insurable interest could be shewn in respect of the greater part of the items stated to have been insured under the denomination of disbursements, and full indemnity for actual disbursements would, in the event of loss, be recovered by reason of the high valuation of hull. It was admitted that it would be a great deal better for the shareholders if the ship were lost. If she completed the voyage she would earn 2400*l.* freight and be worth herself some 9000*l.*, in all 11,400*l.* If she were lost her owners and agents stood to receive 35,600*l.*, less a sum of 2400*l.* freight already paid. Their theory of insurance was to insure the original capital of the company which owned her and add to that the debts of the company.

Accordingly I ask myself in the language of the statute, Would these circumstances influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk? I can answer this question only in one way. In truth the witnesses for the most part answered it in the same way.

It is very possible that some underwriters do not ask and do

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not expect to be told what are the insurances, and that some underwriters gamble. But I do not believe that prudent underwriters would treat as immaterial such over-insurance and such large sums placed on disbursement as were effected in this case.

I have to say that Lord Macnaghten agrees with this view.

LORD ALVERSTONE C.J. My Lords, this is an appeal in an action brought in the Scottish Court upon two policies of insurance for 1000*l.* each effected with the appellants, the Thames and Mersey Marine Insurance Company, on behalf of the owners of the sailing ship *Gunford*. The defenders, the present appellants, resisted payment of the amounts insured on these grounds:—(1.) That there was a breach of the warranty of seaworthiness; (2.) on the ground of non-disclosure of material facts—(*a*) as to the captain of the vessel, (*b*) as to the other insurances effected in connection with the ship.

The facts material to the above-mentioned points are not in dispute. The Gunford Shipping Company, Limited, was managed by Francis Briggs, by whom all the business of the ship, including the employment of her officers and the effecting of insurances, was transacted.

The captain of the vessel on the voyage in question was A. W. Sember. The *Gunford* sailed from Hamburg on October 12, 1907, with a full cargo of patent fuel, coke, and thirteen tons of machinery, on a voyage round Cape Horn to Santa Rosalia. In the course of this voyage, upon the incidents of which it is not necessary to dwell, she on December 10, 1907, went ashore near Cape San Roque and became a total loss.

All the policies, both voyage and time, contained a warranty of seaworthiness. The appellants alleged that this warranty was broken, in that the ship was not seaworthy, because Captain Sember, who, as already stated, sailed in charge of her, was not a competent master. Lord Salvesen, the Lord Ordinary, before whom the case was tried in the first instance, came to the conclusion that there was no breach of the warranty of seaworthiness. He found, after considering the evidence on this question, the captain himself being a witness, and after carefully

discussing all the incidents of the voyage, that the *Gunford* was not unseaworthy by reason of the captain's incompetence. Upon this part of the case your Lordships did not call upon the learned counsel for the respondents. There was, in my opinion, ample evidence on which the learned judge could find as he did, that the captain was not incompetent, and the appeal, so far as it is based upon that ground, fails.

Upon the second ground, namely, that there was concealment of material facts in connection with the employment of the captain, there was a great deal of evidence on both sides. The facts relied upon by the appellants were that a period of twenty-two years had elapsed since Captain Sember had last been at sea, he during that time having been engaged as a stevedore; it was further said that his engagement as captain was made without sufficient inquiry, and the circumstances under which he was engaged were such that it was material to the underwriter to be informed of the previous history and experience of the captain. A great many witnesses were called for the appellants, who stated that, in their opinion, it was material to the underwriters that they should be informed of the circumstances connected with the captain's experience above referred to. The matter formed the subject of some correspondence after the vessel had sailed and before the loss. The Lord Ordinary in his judgment came to the conclusion that, under ordinary circumstances, underwriters rely upon the information at their disposal with regard to the competency of masters, that the name of the master is, as a rule, not inserted in the policy, and that it is only on very rare occasions that underwriters make any inquiry as to his name or history, and that they rely on the shipowners to engage a competent master.

There is no doubt that in this case the information at the disposal of the underwriters would not have afforded the necessary information, because Captain Sember was not appointed master of the *Gunford* until July 19, and the records of information as to masters at the disposal of the underwriters at the date the policies were effected would not have contained his name. I am, however, not prepared to differ from the Lord Ordinary and the Court of Session upon this part of the case.

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Lord Alverstone C.J.

The fact upon which most reliance was placed was that the underwriters were not told that the master had been on shore for twenty-two years ; but this fact could not well be stated by itself without further information as to other matters put before Mr. Briggs as to the qualifications of Captain Sember, and, looking to the well-established usage, I concur in the view taken, as appears in the judgments in the Court below, that there was no concealment of any material fact in regard to the captain.

I have now to deal with the remaining point in the case, and that is whether or not there was concealment of material facts by reason of the non-disclosure of the insurances effected upon the ship. Before discussing this matter it is desirable to state briefly the law applicable to the case.

It is, in my opinion, quite unnecessary to do more than refer to the sections of the Marine Insurance Act, 1906. Sect. 17 is in the following terms: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

Sect. 18 : "(1.) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract. (2.) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. (3.) In the absence of inquiry the following circumstances need not be disclosed, namely:—(*a*) any circumstance which diminishes the risk ; (*b*) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know ; (*c*) any circumstance as to which information is waived by the insurer; (*d*) any circumstance which it is superfluous to disclose by reason of any express or implied

warranty. (4.) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact. (5.) The term 'circumstance' includes any communication made to, or information received by, the assured."

Sect. 19: "Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—(*a*) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him."

The two policies to which the appeal now under consideration related were dated on August 30 and 31, 1907, but the material date for the purpose of the question under consideration, namely, the date of the initialling of the slip, was on August 3. The policies were effected upon the instructions of Mr. Briggs. The actual amount of freight due under the charterparty was 4790*l.*, of which one-half, 2395*l.*, was paid in advance at Hamburg. The disbursements and other outlay, which had been incurred in order to earn the freight, was stated to amount to 5280*l.* Some portion of this amount would not have created any insurable interest having regard to the provisions of s. 16, but in the view I take of this case it is unnecessary to say how much. Moreover, it was conceded that the only source from which these disbursements could be repaid was the freight earned by the ship, which freight was itself insured. The insurances which were effected on behalf of the owners amounted to 29,300*l.*, as follows:—

Hull, valued at 18,500*l.* . . .	19,000*l.*
Freight, valued at 5500*l.* . . .	5,500*l.*
Master's effects, valued at 200*l.* . .	200*l.*
Disbursements, p.p.i. policy . .	4,600*l.*
	29,300*l.*

In addition Mr. Briggs took out, for his own protection, insurances to the amount of 6500*l.*, by p.p.i. honour policies, making in all 35,800*l.* The evidence established that the actual value of the property at risk was hull 9000*l.*, and freight about 5000*l.*, but, as already stated, the underwriters accepted a

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policy upon which the hull was valued at 18,500*l.* Assuming that no part of the disbursements should be taken into consideration as being included in the difference between 9000*l.*, the actual value of the hull, and 18,500*l.*, the insured value of the ship, there was still a double insurance in respect of the alleged disbursements to the extent of 4600*l.* in addition to the 6500*l.* insurances effected by Mr. Briggs.

If the difference between the declared 18,500*l.* and actual 9000*l.* value was represented by any insurable interest in disbursements, the over-insurance or over-valuation would be correspondingly increased.

It was proved in evidence that no dividends had been earned by the ship for about seven years; it was further established that the object of the insurances was to cover debts owing by the company in the event of the loss of the vessel. There was further evidence that the profits which were being earned by the ship could not stand the amount paid in respect of premiums of insurance. All the disbursement policies were valued policies—that is to say, in the event of the ship being lost the full amount would be paid—and it was admitted by Mr. Briggs that it would be a great deal better for the shareholders if they lost their ship under the policies than if they had to realize their ship by sale, unless they got the Spanish Government to buy or a war took place. Even assuming the value of the ship to be taken at 18,500*l.*, the total amount at risk did not exceed 23,500*l.* before the moiety of the freight was paid at Hamburg and a little over 21,000*l.* after the vessel left Hamburg. Some distinction was attempted to be made between over-valuation and over-insurance, but, inasmuch as all the policies were valued policies, the question becomes immaterial. There was on the evidence over-valuation to the extent of 11,100*l.*, without taking into consideration the difference between the declared value, 18,500*l.*, and the actual value, 9000*l.* Apart, then, from evidence in the particular case, it seems to me that the statement of the above facts is sufficient to shew that, looking to the provisions of the Act of 1906, the circumstances above stated were material as being those which would influence the judgment of a prudent insurer in fixing the premium or determining whether he would take the risk.

Before proceeding to examine the evidence bearing upon this part of the case I think it well to consider the grounds upon which judgment has been given for the pursuers in the Court below. Lord Salvesen, in the first instance, left out of view the honour policies; he further held that the pursuers were not concerned with the policies of 6500*l.* taken out by Mr. Briggs, because their manager entered into the contracts for his own behoof and without the authority of the pursuers; and he also held that it is not in accordance with the principles and calculations on which underwriters in practice act that there should be any disclosure with regard to policies covering other risks which the particular underwriter is not asked to accept. The Lord President adopted in terms the reasoning of Lord Salvesen, and further, in the passage at the end of his judgment, appears also to put out of view the policies which were effected by Mr. Briggs.

Lord Johnston considered that as soon as it was ascertained that the policies in question were valued policies the case was at an end.

I refer to these reasons, because, with the greatest respect for the opinions of the learned judges, they do not seem to me to have sufficiently considered the question of concealment as it arises upon the sections of the statute to which I have called attention, and had not, so far as I can follow their judgments, considered the evidence bearing upon this part of the case.

Before I refer to that evidence I think it well to say that I cannot accept the view that the 6500*l.* honour policies, effected, it is said, by Mr. Briggs for his own protection, can be put out of view on the grounds suggested by the judgments. Mr. Briggs was the managing owner of the ship, the disbursements, in respect of which he was purporting to insure, were moneys due from the ship to him, and in considering whether there was over-valuation or over-insurance (and in this case, as I have pointed out, the terms are synonymous), which ought to have been disclosed to the underwriters, I cannot, having regard to the provisions of s. 19, put out of view the 6500*l.* policies effected by Briggs, nor does it, to my mind, make any difference in regard to the duty of disclosure that the policies

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covering this 6500*l.* and the policies for the 4600*l.*, also for disbursements, were honour policies. These policies were void under s. 4 of the Act, but they go to swell the sum which would be payable in the event of the ship being lost, and the total amount being upwards of 35,000*l.*, whereas the value actually at risk did not exceed 14,000*l.*, there was a very large over-valuation which might well make a prudent underwriter hesitate both as to undertaking the risk and consider the premium which he should require before doing so. I am aware of the doubt suggested by the Court of Appeal in *Roddick* v. *Indemnity Mutual Marine Insurance Co.* (1) as to whether the effecting of honour policies was a breach of a warranty not to insure; but in my opinion the view taken by Kennedy J. in that case was correct, and at any rate the point does not affect the question now under consideration.

Dealing now with the evidence in the case, the whole of which I have carefully considered, though, having regard to the terms of the statute and the duty of the assured, I doubt whether a great part of it was relevant or admissible. The practice of underwriters as to accepting any risks or not making inquiries on particular points cannot, in my opinion, affect the duty as defined by statute, and cannot properly be received as evidence of waiver in any particular case. I have, however, come to the conclusion that the evidence as given establishes, beyond any reasonable doubt, that the matters to which I have referred were material to be disclosed. Taking first the evidence of the pursuer, it is to be noted that, although Mr. Lockhart, one of the principal witnesses for the pursuer, stated that it is not the practice for underwriters now to be informed or to inquire as to what are the current insurances on other interests, such as freights or disbursements, the witness admitted in cross-examination that, had he not known, he would want a satisfactory explanation as to the large amount of the total insurances, and that without explanation he would probably not take the risk. It is to be noted that Mr. Lockhart was well acquainted with all the facts of the case, and knew the reasons which had induced Messrs. Briggs to insure to the

(1) [1895] 2 Q. B. 380.

extent which they had done. Mr. Dixie, who was the manager to Messrs. Howard Houlder & Co., had done the *Gunford's* insurance ever since 1893 and knew all the facts, and it was his firm that had effected the policies with the underwriter. Mr. Boyd, also a witness for the pursuers, stated that the value of the hull was far too high; and Mr. Shankland, who stated that the underwriters would not be in the least concerned by other policies for disbursements, does not appear to have given satisfactory answers to the questions put to him in cross-examination. On the other hand, the evidence of Mr. Jervis, Mr. Douglas, and Mr. Lemon seems to me to be entitled to great weight, as well as that of Mr. Swan and Mr. White.

I have referred to this evidence in some detail, because I felt it right to consider how far the view which, apart from the evidence, I had formed as to the materiality of the facts not disclosed is borne out by the testimony given in Court, and, speaking for myself, I unhesitatingly come to the conclusion that, both from the point of view of fixing the premium and determining whether he would undertake the risk, the over-valuation was a matter material to be considered by the underwriter. As regards the amount of premium this view is confirmed by the correspondence which passed between the brokers, Howard Houlder & Co. and Francis Briggs & Co., when the insurances were being effected. I will not refer to the letters in detail, but when the brokers were being asked on July 30 to insure 13,000*l.* on hull, 6000*l.* on freight, 6000*l.* on disbursements, and 200*l.* effects they replied: "The market is very difficult for this outward voyage, and, as we have already mentioned to you, we see no possible chance of placing the lines you wish covered on freight and disbursements at anything like a reasonable price; indeed, we would go further and say we do not think there is a market for such amounts at any price."

Your Lordships were informed by counsel for the respondents that this correspondence was not referred to during the arguments in the Courts below. I have only mentioned it because it cannot be said in any way to displace the inference of fact which I have drawn from the evidence which I have quoted.

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A distinction was drawn in argument by Mr. Clyde between insurances on hull, or hull and materials, and insurances on ship. For some purposes, I agree, there may be a distinction, but it is wholly immaterial in this case, having regard to the difference between the valuation of the interests and the amount insured as contrasted with the value actually at risk. In my opinion the appeal should be allowed and judgment given for the defenders on the ground that the policies were void owing to concealment of material facts.

In the second appeal, which is brought by the Southern Marine Mutual Assurance Association, upon the main point the facts and arguments were the same, but it was alleged on behalf of the respondents that the defenders were not entitled to the benefit of the objection because they received payment of premium after they knew of the facts, and had, with the same knowledge, agreed that the ship should remain insured with the association until her arrival. I am satisfied that the appellants had not full knowledge of the facts when they received payment of the premium, and that the agreement to keep the vessel covered was made at a time when they were disputing their liability under the policies. No distinction should therefore be drawn between the two cases.

LORD SHAW OF DUNFERMLINE. My Lords, in this action the respondents, the Gunford Ship Company, Limited, and the liquidator thereof seek to recover a total loss upon two policies of insurance, each for 1000*l.*, effected upon the hull of the ship *Gunford* for the voyage from Rotterdam to Hamburg and thence to Santa Rosalia. The one policy is dated August 30 and the other August 31, 1907. The insurances were effected through the agency of one Francis Briggs, the managing owner of the *Gunford*. He was also manager of the Gunford Ship Company, Limited, which appears to have been an ordinary one-ship company. The claim is resisted by the appellants on various grounds. Two of these alone have been the subject of argument—the first, namely, that the contract is void because the vessel was not seaworthy at the inception of the voyage; and the second, that the contract is voidable by reason of

concealment by the assured and their agent of facts material to be known by the insurer.

The *Gunford* was towed from Rotterdam, and on October 12, 1907, left Hamburg with apparently a full cargo. She was wrecked on November 29 near Cape San Roque, on the Brazilian coast. After various ineffective tackings for the purpose of weathering the Cape she struck badly on a rock or reef and became a total loss. The crew of twenty-six reached the shore in safety, although ten sailors unfortunately died of a fever caught after landing. A Board of Trade inquiry was held upon the circumstances, and there seems no reason to doubt the soundness of its findings, that the stranding was caused by the default of the master. His certificate of competency was suspended for twelve months.

My Lords, having come to the conclusion, which I shall presently mention, that the contract of insurance is, on the ground of the concealment of material facts, not enforceable, it is not necessary that I should enter upon the merits of the plea of unseaworthiness, a plea which is founded upon the alleged incapacity of Captain Sember for the responsible post of master of this sailing vessel. Sember's record was not good. He had not been to sea for twenty-two years, having been acting mostly as a stevedore during that time. When he was last at sea his conduct had been such that his certificate had been suspended for six months, his ship having been lost. The certificates which he produced, although good, should have prompted inquiry into his record. But, answering an advertisement, he was appointed as mate of a vessel named the *Belford* at 9*l.* a month, and within a few days he was appointed master of the *Gunford* at 20*l.* a month. The interviews at which these appointments were made lasted a few minutes. They were held with Briggs, whose relation to the vessel and to the company will be afterwards mentioned. My Lords, I am not satisfied in my own mind that Sember was a competent master, and I incline strongly to the opinion that his record was such as to impose a duty upon the assured to explain to the insurers the peculiar and, as I hope, unique circumstances of the appointment. Upon either view the claims under the policy would fail. I have,

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however, sufficiently indicated my doubts as to this part of the case, and I do not think it necessary to dissent from your Lordships' opinion upon it, having, after much consideration, no doubt that the defenders should be assoilzied on the second head of the argument.

My Lords, by the policies the insurance is "declared to be upon hull and materials valued at 18,500*l.*" The vessel was an old vessel and, from the point of view of realization in the market, was apparently worth 9000*l.* Had this over-valuation been tainted by fraud the contract of insurance could not have been enforced. Where there is heavy over-valuation fraud is, a priori, not very far to seek. But fraud is not here pleaded; and upon the general question it ought to be remembered that to the insurer using a ship as part of the going concern of a business a statement of value going much beyond the amount to be realized if the concern was stopped and the asset put upon the market is intelligible and legitimate. It is not discountenanced by the Marine Insurance Act of 1906, but, on the contrary, is, apart from fraud, held under s. 27, sub-s. 3, of the statute to be conclusive of the insurable value. It was not argued that this part of the transaction was assailable in law.

My Lords, much more serious considerations, however, follow. There were insurances on freight to the extent of 5500*l.*, and insurances on disbursements to the extent of 4600*l.* The latter policies, those on disbursements, were p.p.i. policies. They were bound to be so, because in point of fact, as was admitted in argument for the respondents, the disbursements were the very things which had been already accounted for in the freight, and when the ship became a wreck the payment on these policies was not to be a payment of indemnity, but a present to the assured of this sum of money, a present falling to be made in the event of the wreck and loss of the vessel.

The story, however, does not stop there. There were also insurances on disbursements on behalf of Briggs. These were time policies current during the voyage to an amount of no less than 6500*l.* Briggs had made advances to the bank on behalf of the company, and he was in other ways deeply involved as a creditor. Any payments made under these insurances would,

again, not be payments to indemnify Briggs for loss, but would be of the nature also of presents, presents made on the issue of a gamble upon the life of the vessel, the issue to be favourable to Briggs when the vessel was lost.

My Lords, it needs no words of mine to point out that property at sea and the lives of seamen stand in the greatest peril if business of that character obtains the sanction of law. These policies are admitted to be p.p.i. policies—that is to say, "without further proof of interest than the policy itself." They are, therefore, by s. 4, sub-s. 2, of the Act of 1906, deemed to be gaming or wagering contracts, and by sub-s. 1, "Every contract of marine insurance by way of gaming or wagering is void." These sub-sections simply express the principles of the law anterior to the Act; but, to judge from the facts of the present case, the abolition of gambling, involving danger to property and life at sea, has not been much furthered by these plain words of the Legislature. Indeed, the argument of the respondents—an argument which has succeeded in the Court of Session—is this, that the policies *are* policies of insurance without real insurable interest; that they *are* gambling and wagering policies, but that the shipping and insuring world is aware that such things go on; and that every insurer of ship or hull takes his risk that the scales may be weighted in favour of the destruction of the vessel by that kind of underwriting.

This argument, my Lords, raises, in my humble judgment, something much more serious than a mere question of the duty of disclosure; it is necessary to examine fundamentally the position of an owner who has made legitimate insurances upon ship, cargo, or freight and also made separate gambling insurances.

My Lords, it appears to me that, wherever owners enter into gambling transactions of this kind, these transactions themselves are not only invalid but they infect and invalidate the entire insurances which the same assured have made upon vessel, freight, or cargo. The reason of that is this: the voyage is one, and the ship, its earnings, its cargo, its crew, all are involved in that one and single hazard which has been undertaken and which is by the gambling transaction improperly weighted towards

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loss—a loss which, falling upon the ship, would not rest there, but spread to unsalved cargo and to freight, not to speak of the peril to human life which would be thus encountered The line of plain duty for all parties to the contract is that the ship shall be preserved; but when a gamble has been made by one of the parties for gain upon the event of loss of ship, although the subject of the particular gamble be not the ship itself, the interest of that party is that the ship shall be destroyed. This hazard against the life of the vessel humbly appears to me to taint every policy entered upon by the same gambling adventurer, and no such policy thus depending upon the same hazard is enforceable. The rule governing this is simple and familiar, namely, that the law will not countenance or enforce a transaction which is thus tainted by conflict between duty and self-interest. The rarity and difficulty, my Lords, of a right adjustment of the wavering balance swayed by self-interest have been memorably phrased. But the law does not attempt the task; the penalty against such a conflict between interest and duty is the invalidation of the bargain. I remark, however, that the foregoing observations are not directed to the case of insurances upon ships in which third parties have acquired, in ignorance of the other and over insurances and in good faith and for valuable consideration, separate interests. The rights of such parties would require to be separately and fully considered.

The case as presented, my Lords, although it touched, and could not but touch, this fundamental ground, was taken as an issue on the duty of disclosure, and I accordingly proceed to treat it on that footing. So dealing with it I do not find myself able to agree with the judgments of either House of the Court of Session. It follows from the nature of the argument there presented that no duty rests upon the owners or agent to disclose to the insurers of the hull facts of the character found in this case. My Lords, I cannot assent or give any countenance to such a view. The learned Lord Ordinary says: "I cannot see that there is any duty whatever on the part of the assured to disclose to the underwriter on hull, who accepts the vessel at a declared value, that he is also effecting insurances upon freight and disbursements." My Lords, the opinion of all

your Lordships is to an opposite effect, and I humbly agree with that opinion. So far as the effecting of insurances upon freight is concerned that is sound business, because it is grounded upon a stipulation for true indemnity; but so far as disbursements, wherever they are duplications of freight, are concerned, these, when freight has already been insured, form no part of a contract of indemnity, but the insurance upon them is merely a gamble, discountenanced by sound principle and not enforceable by law. It forms a distinct temptation of self-interest to business and to conduct which are nefarious.

In point of fact, however, my Lords, these illegitimate, dangerous, and unenforceable policies are entered upon because of the knowledge that in the majority of cases, if the hazard placed against the life of the vessel be won, the stake will be paid. The competition in the underwriting world seems to be such that with premiums paid down no questions will be asked and nothing will be said should loss ensue. It is this which in fact constitutes the peril to property and life, and I am not surprised, my Lords, that in this case witnesses like Mr. Douglas, speaking apparently with the authority of large associations of underwriters, condemned the practice. "If I had known," says Mr. Douglas, "that so much was on the vessel, I would not have touched her with a six-foot pole, because I consider that such insurances are a direct incentive to loss." In another passage Mr. Douglas remarks with force, "She is insured *for* loss and not *against* loss." As I have observed, the practice is continued because underwriters pay upon such policies. They go by the much-abused name of "honour"; and the illegitimate "honour" policies constitute that incentive of self-interest towards the destruction of the vessel that the law holds, quite apart from proof of fraud in the specific transaction, to be enough to make the policy void. It appears to me, differing in this by a very wide diameter from the judgment of the Court below, that when insurances of that illegitimate character are also effected by the owner and insurer of the hull the duty of disclosure of that material fact is plain. Their non-disclosure can, in my humble judgment, be pleaded as an answer to liability upon any policy effected over the hull.

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My Lords, I have already referred to the honour policies for 6500*l.* taken out by Briggs as an individual. The Lord President says that he feels difficulty "in holding that a policy upon the hull, for the ship, should be held as bad, because a person who was acting as managing owner or managing director did not disclose that he, as an individual, had honour policies in connection with the same venture." Lord Salvesen is also of this opinion. He holds that the insurers are not concerned with the honour policies at all, and that the fact that the director "entered into contracts which are not legally enforceable for his own behoof, and without their (the owners') authority is, in the absence of fraud, as irrelevant as if an outsider had had a gamble on the fate of the *Gunford*." "Moreover," adds the learned Lord Ordinary, "I think it is not in accordance with the principles and calculations on which underwriters in practice act, that there should be any disclosure with regard to policies covering other risks which the particular underwriter is not asked to accept."

My Lords, if this be the law, it is manifest that a most dangerous situation has arisen, for, as I have already pointed out, the importation of self-interest in favour of loss is thus permitted and unchallenged by law, although it is that very thing which, in principle and by repeated authorities, stands condemned and disallowed. But, my Lords, I do not labour this matter of the policies and position of Briggs, nor do I cite the decisions, because it appears to me that s. 19 of the statute of 1906 puts plainly a duty of disclosure upon the agent: "The agent of the assured must disclose to the insurer (*a*) every material circumstance which is known to himself." It is admitted that the honour policies for 6500*l.* were known to Briggs, being, in fact, his own insurances. The circumstances of these heavy gambling policies having been entered into were, in my opinion, most material to disclose to insurers of the hull. How such knowledge on the part of Briggs, and the duty of disclosure arising from it, should be held not to fall under the plain provisions of the statute I am somewhat at a loss to understand. These Briggs honour policies for 6500*l.* fall to be added to the other disbursement policies of a

gambling nature for 4600*l.*; and it thus appears that to the extent of 11,100*l.* no disclosure was made and the ship was sent to sea, the scale of self-interest in favour of her destruction being as stated.

I am of opinion that, these being the facts, the objection taken to the liability on the policies is good, and that the appeal should succeed.

LORD ROBSON. My Lords, the first question that arises in this case is whether or not the *Gunford* was unseaworthy by reason of the incompetence of her captain. The learned judge at the trial, Lord Salvesen, has answered that question in favour of the plaintiffs, and there is ample evidence to justify his finding. The next question is whether, notwithstanding that the captain was in fact competent, his record was so suspicious and unsatisfactory that the plaintiffs must be found guilty of concealing material facts in not communicating to the insurers such knowledge as they possessed of his antecedents. It is easy to state the case against the plaintiffs on this head in a way that raises suspicion as to their conduct, but on the whole I think they were entitled to the exoneration they have received at the hands of the learned trial judge in answer to this question.

They may fairly plead in their favour that they believed in the strong testimonials, from most respectable firms, with which the captain supported his application for employment. A firm of high standing wrote that they had employed him for thirty years, first as mate, then as master, and latterly as stevedore, and during the whole of that time found him an active, energetic, and competent man, adding that they recommended him to any one requiring his services. They did not think it necessary to state that he had been on shore for the preceding twenty-two years. The nearest approach to that information was made by a gentleman of position in the shipping world, who, in strongly recommending the captain, said he had known him for over twenty years, first as master in a line of sailing ships, "but for most of that time he had been engaged in stevedoring and superintendence." There were other testimonials equally emphatic, and equally imperfect. At the same time the

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inquiries, if any, made by the plaintiffs were of the most perfunctory kind. They made the appointment with a minimum of trouble, and the best that can possibly be said for them is that in the then existing circumstances it was necessarily made in a hurry.

But the most important question in the case arises in connection with the insurances. The appellants say they were excessive. So far as the excess consisted of over-valuation on the legitimate policies no complaint is open to the appellants, for the values were agreed and so bind the insurers. That part of the case is therefore put forward by them only as shewing that the legitimate policies more than covered the risks and left no excuse for the making of wager or "honour" policies. Their complaint rests in substance on the non-disclosure of those wager policies.

The vessel had originally cost 20,750*l.* At the date of the policies now in question she was fifteen years old, and was worth about 9000*l.* to sell. For the purposes of insurance of the hull and materials her value was agreed at 18,500*l.* The underwriters, of course, were well aware that this was an over-valuation. Knowing, as they did, the age and type of the vessel and the rate of annual depreciation, they could tell, almost as exactly as her owners, what she was worth ; and, moreover, they had, as it happened, regularly insured her for years past. Although the contract of insurance is expressed to be a contract of indemnity, and the indemnity is properly based on market value at the time of the loss, yet the law allows the insured value to be agreed between the parties, and the agreed value, though frequently, and perhaps generally, in excess of the market value, is binding in the absence of fraud. There are often legitimate business reasons for this discrepancy between the selling value and the insured value, and it should not be assumed that it necessarily creates any actual conflict between duty and interest on the part of the shipowner in regard to the safety of the thing insured. The assured naturally aims at reinstatement rather than bare indemnity, and the insurer has also his own reasons for preferring that the values should be high so long as they do not constitute a temptation to loss. In order that he may be saved the trouble of small claims, which are often

of a doubtful character, he stipulates that the ship shall be warranted free from average under 3 per cent., and where the total agreed value is high the insurer's protection under this clause is increased. Again, in claims for constructive total loss, the higher the value the more difficult it is for the assured to establish that the cost of repairs will exceed the repaired value, so as to entitle him to treat the vessel as lost and leave the wreck on the insurer's hands. The insurer is therefore willing to undertake the risk of a certain amount of over-valuation, relying no doubt on the character of the assured and also on the interest that the managing owners or managers have in preserving the ship as a source of business profit to themselves. In addition to the hull and materials, the plaintiffs insured the gross freight at 5500*l.* This policy also involved an over-valuation, as it made no deduction for the expenses of earning the freight; but the insurance of gross instead of net freight is expressly allowed by our law, and is of great practical convenience in avoiding a troublesome, uncertain, and possibly litigious inquiry into working expenses.

By the foregoing policies the plaintiffs secured that in case of loss they would receive more than a strict indemnity based on existing values, but perhaps not quite enough to replace the article insured without some slight loss. They proceeded, however, to effect a valued policy for 4600*l.* on "disbursements." A list of the payments comprised under this head was put in by the plaintiffs, and amounted to 5280*l.* as against a total chartered freight of 4790*l.* So far as these payments consisted of current working expenses necessary to earn freight they were covered by the insurance on the gross freight, and so far as they consisted of repairs, outfit, and insurance premium on hull they would ordinarily be included in the policy on ship and materials.

This policy was therefore an over-insurance by double insurance. The plaintiffs could not legally avail themselves of it to enforce recovery of any sum in excess of the indemnity allowed by law, but this was a "p.p.i." or honour policy, i.e., it was made "without further proof of interest than the policy itself." In other words, it was a wager, and it is well known

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that the sums insured under such policies are, under ordinary circumstances, paid with the same regularity as if they were legally due.

A further policy of the same character for 6500*l.* was taken out on his own account by Mr. Briggs, the plaintiffs' manager, who had the conduct of the whole transaction, and is by s. 19 of the Marine Insurance Act, 1906, made responsible for disclosure of every material circumstance within his knowledge. The question to be determined by your Lordships is whether it was material to the insurers of the hull and freight to be informed of these honour policies, and that depends on whether they were among the circumstances which would "influence the judgment of a prudent insurer in fixing the premium or in determining whether he will take the risk." This is a question of fact, and there was evidence both ways about it in the form of underwriters' opinions on the point. Without depreciating the value of those opinions I think a jury, or a Court of law acting as a jury, when once made acquainted with the general conditions of marine insurance, can easily decide for themselves how far any particular circumstance would influence the judgment of a prudent insurer. The proposition laid down by Lord Blackburn in the case of *Ionides* v. *Pender* (1), that excessive and speculative insurance has "a direct tendency to make the assured less careful in selecting the captain, and to diminish the efforts which in case of disaster he ought to make to diminish the loss," can scarcely be contested, and, however willing individual insurers may be to take the risk of such insurance, their opinion cannot bind others of more prudent temperament.

So long as the parties to a policy are dealing only with agreed values on ship or freight, high as those values may be, the ordinary course of insurance business provides substantial safeguards, both to the legitimate insurers and the seamen, against the dangers referred to by Lord Blackburn, but those safeguards are materially diminished when the owners or managers take to wager policies with other underwriters. The insurers can ordinarily make sure that the agreed value shall fall short of

(1) (1874) L. R. 9 Q. B. 531, at pp. 538, 539.

what is necessary for complete reinstatement. Even when the agreed value is high enough to give a profit to the shareholders, the insurers can estimate the heavy loss of business and management profits which the destruction of the ship may impose on the managers, and it is to the managers they look for vigilance and care in securing her safety. But when, as in the present case, the wager policies increase the amount recoverable by the owners on a total loss to a figure far in excess of what is needed for reinstatement, and, worse still, when the managers themselves stand to make a large profit under such policies in case of loss, the incentive to care over the safety of the ship begins to be substantially affected, and the insurers are entitled to form their own opinion as to how far they will trust the assured under such circumstances.

I think, therefore, that the existence and amounts of the wager policies were circumstances material to be disclosed, and that this appeal should be allowed.

LORD LOREBURN L.C. My Lords, as I have said, Lord Macnaghten agrees in this conclusion. In regard to costs—the expenses—the judgment of your Lordships will involve the respondents paying to the appellants their expenses here and in the Courts below; but, having regard to the issues of fact which are found in favour of the respondents, I think that ought to be less one-half of the costs of the proof before the Lord Ordinary.

Ordered (in both appeals) that the interlocutors appealed from be reversed: that judgment be entered for the defenders, and that the respondents do pay to the appellants the costs here and in the Courts below, less one-half of the costs of the proof before the Lord Ordinary.

Lords' Journals, June 28, 1911.

Agents for appellants: *Waltons & Co., for J. & J. Ross, W.S., Edinburgh.*

Agents for respondents: *William A. Crump & Son, for Webster, Will & Co., W.S., Edinburgh; and Wright, Johnston & Mackenzie, Writers, Glasgow.*

[HOUSE OF LORDS.]

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JOHNSTON AND OTHERS . . . . . APPELLANTS;

AND

O'NEILL AND OTHERS . . . . . RESPONDENTS.

Fishery—Navigable Non-tidal Lake—Public User—Prescription—Evidence—Crown Grants.

In an action by the respondents against the appellants claiming the exclusive right of fishing for eels in Lough Neagh grants by the Crown to the respondents' predecessors in 1605 and later were put in and evidence was given as to the receipt of rents by those predecessors from their lessees of the fishery. There was also evidence that the public had for centuries as of right and without interruption fished for eels in Lough Neagh, which was non-tidal:—

Held by the Earl of Halsbury and Lords Ashbourne, Macnaghten, and Dunedin, that the respondents were entitled to the exclusive right claimed and to an injunction restraining the appellants from fishing.

Held by Earl Loreburn L.C. and Lords Shaw of Dunfermline and Robson, that there was no satisfactory evidence to shew any actual possession or any right in the Crown or its grantees to the exclusive fishery claimed, and that the action did not lie.

Decision of the Irish Court of Appeal, [1909] 1 I. R. 237, affirmed.

THE circumstances of this appeal are stated in the judgments of Earl Loreburn L.C. and Lords Macnaghten, Shaw of Dunfermline, and Robson. The appeal was twice argued: first in 1910 before Earl Loreburn L.C. and Lords Ashbourne, James, and Dunedin; and again in January and February, 1911, before the Lords named in the head-note.

Gordon, K.C., and *Healy, K.C.* (*J. P. Kerr* with them) (all of the Irish Bar), for the appellants.

Ronan, K.C., and *Jellett, K.C.* (*Gaussen, K.C.*, with them) (all of the Irish Bar), for the respondents.

The House took time for consideration.

July 14. EARL LOREBURN L.C. My Lords, this case has been twice argued, and the mass of documents, accounts, Acts of Parliament, authorities, and comments of all kinds has been very great,

The conflict really is whether or not the public, who have been in fact accustomed from time immemorial to fish in Lough Neagh openly as of right and without interruption, ought to be restrained from fishing any longer at the suit of the plaintiffs, who claim a title in law.

This action relates to eel fishing alone, and the injunction is limited to a comparatively small area of the lough, with liberty to apply as to the rest; but if the title put forward by the plaintiffs can be established, those who possess it will be entitled to an exclusive fishery for all kinds of fish all over the lough, and to dispossess a great number of men who live by the occupation they have hitherto followed. This is a serious matter. We were also told that, unless the plaintiffs succeed, their lucrative eel fishery in the river Bann, which is the outflow from this lough, will be destroyed. That also is a serious matter.

The plaintiffs' case, put quite generally, is that in 1605, and also by later grants, their predecessors in title obtained from the Crown an exclusive right of fishery in a great stretch of the river Bann, and also in the whole of this lough; that the Crown had a title to make the grants; that their predecessors have continuously possessed and actually enjoyed the fishery so far as the river is concerned; that this is also a possession of the fishery in the lough, which was a nursery and feeding ground to supply the river; and that such predecessors have also from time to time dealt with and received rents from others for the fishery in the lough itself. They say further that, although the public have, in fact, always fished in the lough, that has been merely by indulgence, and not under any legal right, because there can be no such thing as a right in the public to fish in non-tidal waters, and if the public cannot have the right, no other title has ever been put forward to compete with their own.

The defendants' case, also put generally, is that the public can in law have such a right, and that in any case the plaintiffs can succeed only on the strength of their own title, and not on the infirmity, if such there be, of the defendants' title. They admit the plaintiffs' possession of the river fishery, but say that is not possession of the lough fishery.

This dispute in another form came before your Lordships'

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House in the case of *Bristow* v. *Cormican*. (1) The only point actually decided in that case was that Lawson J. had exceeded his power in directing a verdict, and that there must be a new trial. There never was a new trial, but the reasoning and observations of such great judges as Lord Cairns, Lord Hatherley, and Lord Blackburn are of the utmost value.

In that case the plaintiffs claimed a several fishery in Lough Neagh said to have been invaded by one Cormican, and claimed it under the identical title set up by the now plaintiffs, which I will call the Chichester title. The defendant Cormican alleged, as here, a right in the public and denied the title to the lough. There, as here, no third persons advanced any claim. The claim of public right had been decided to be bad on demurrer, and that decision, to the effect that such a right could not exist in non-tidal waters, was not appealed from, and therefore not before the House of Lords. Lord Cairns, while pointing out that it was not before the House, by no means brushed aside the claim of public right. He said that it might be a fit question to raise in some other case.

The next thing deserving of notice in *Bristow* v. *Cormican* (1) is that, though the public right was not available to the then defendants, and no other title to the Lough Neagh fishery except the Chichester title was put forward or even suggested, yet the House of Lords did not relax upon that account the stress that lay upon those who asserted the Chichester title to prove it even against trespassers. On the contrary, the Lords strictly scrutinized the documents relied upon to establish that title, from a Royal lease of 1660 and grant of reversion upon its expiration, onwards for 220 years, and affirmed the necessity of the claimants proving that Charles II. had the right to grant the lease and the reversion. The Chichester title being documentary, it was for a jury to say whether it had been fortified by actual possession or was merely a paper title not representing any real right.

Further, when considering what is in reality evidence of actual possession in a particular place, the Lords who decided that case had a practical instance to deal with. The question was whether

(1) (1878) 3 App. Cas. 641.

the then plaintiffs had been in possession of a fishery in Lough Neagh at a place called Feumore, and, in order to prove the affirmative, alleged that they had enjoyed a fishery near Shane's Castle, ten or twelve miles away, on the same lough. Could that be regarded as evidence of possession at Feumore? The point was not decided, but it was treated as an open question for the jury whether there was such a common character of locality that to fish at one place was equivalent to fishing at the other. It is remarkable that in *Bristow* v. *Cormican* (1) no one contended that the paper title to fish in the lough could be strengthened by evidence of fishing in the river Bann, which had unquestionably been done under one and the same title.

I have dwelt upon that authority because it affords great assistance in coming to a conclusion in the appeal now before your Lordships.

I now proceed to examine the Chichester title in order to ascertain whether it is proved that the exclusive fishery in Lough Neagh was in the Crown, and by the Crown granted to the plaintiffs' predecessors.

It is more convenient, and will enable me to make what I have to say clearer, if I begin by stating my own conclusion at once.

I have arrived, after much reflection, at the conclusion that in 1605, and in the subsequent years down to 1661, when the Chichesters obtained their grants, the Crown may have had something to grant, but it is not proved that the Crown had the fishery in Lough Neagh. The Crown may have had, almost certainly did have, large tracts of country forfeited for rebellion, none of which, however, are proved to have been riparian to Lough Neagh. Also, the Crown probably then had rights of fishing in the river Bann, and lands riparian to that river, to which the fishing rights were most likely attached. These were granted, and, so far as can be judged, have always been enjoyed by the Chichester title. But as to the water of Lough Neagh itself, though the claim to it runs like a thread through the documents from beginning to end, it seems to me that the plaintiffs' predecessors, however diligent in saying that

(1) (1874) I. R. 10 C. L. 398.

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they were entitled to it, have been careful not to make good their claim by any persistent and unequivocal attempt at exclusive possession, while in some of the documents the frailty of the title is almost confessed. When I add that there never has been any exclusive possession proved in this action, I cannot feel satisfied that there was any right in the King or his grantees. It is an extraordinary thing that, if the Crown had this to give, every one who pleased should have continuously acted in defiance of the supposed right for so long a time.

I come now to the documentary title.

There is an inquisition holden at Antrim on July 12, 1605, which states that Queen Elizabeth owned all manner of fishings in all that moiety of Lough Neagh which lies towards the east, together with certain ancient weares in the river Bann, and a certain free fishing in the said river. The inquisition further states that Queen Elizabeth also owned great tracts of territory with castles, manors, and so forth, in county Antrim, and had in 1571 covenanted to grant to Sir Thomas Smith and his son certain hereditaments, including the above-named fisheries, as I read the document, provided the Smiths won and possessed themselves thereof before March 28, 1579, by means of a military expedition which they undertook to collect and lead into Ulster. Neither of the Smiths possessed himself of the subject-matter of the grant, all of which the jurors say belong to King James on July 12, 1605, "as well in right of his Crown of England as by reason of the force and intention of divers statutes in that behalf made ordained and established." What the statutes were we are not told.

The next document was cited to us as of date February 14, 1605. I rather think it may have been 1606 and not 1605, but it does not much signify, and I take the date as cited. It is a grant from King James of the entire fishing of Lough Neagh and the eel weares in the river Bann and all fisheries in the river Bann from the lough down to the salmon leap, with the soil and islands in lough and river and a power to approach and place nets on the banks of either from any direction. The grantee was James Hamilton.

Next comes an inquisition holden at Limavaddy on August 30,

1609, which states that King James had granted the fisheries in the river Bann and the soil thereof to James Hamilton, and that Hamilton had conveyed the same to Sir Arthur Chichester, then Lord Deputy General of Ireland, who was now seised thereof. Nothing is said of Lough Neagh in the extract before us of this document, and if the earlier inquisition and the grant to Hamilton were valid the necessity of this document is not apparent.

In 1613 there is a grant from the King dated March 29 to the Society of the Governors and Assistants of London of the entire river Bann and the soil thereof and all fishery therein, from the deep sea up to Lough Neagh, excepting a fishery belonging to the Bishop of Derry in the river Bann. Manifestly this grant is quite inconsistent with the grant to Hamilton, because it includes the whole of the river Bann, part of which had been granted to Hamilton. How the King came to alienate this fishery a second time is not explained.

Eight years later, on April 6, 1621, another inquisition was holden at Carrickfergus, in which the jurors purport to give a history of the King's dealings with the fisheries of Lough Neagh and the river Bann down to the salmon leap. They say that the King granted these fisheries in 1605 to James Hamilton, that Hamilton then gave and granted them "for good and valuable consideration" to Sir Arthur Chichester in 1606, "by virtue of which feoffment the said Arthur Lord Chichester was seised in his demesne as of fee to him and his heirs for ever" of these fisheries among other things. The jury then proceed to say that on July 4 in the sixth year of his reign (which would be 1608 or 1609) the King granted to Arthur Bassett lands (which are not specified in the extract and are not material) and also the entire fisheries in and soil of Lough Neagh and the river Bann down to the salmon leap, together with the eel weares in the river, and the power of approaching the banks—in short, the very same that had been already granted in 1605. They further say that the grant to Bassett was "upon trust and confidence" for and to the use of Arthur Lord Chichester, and that Bassett on January 23 in the seventh year of King James's reign (1609 or 1610) had enfeoffed Lord Chichester of and in the same "by

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virtue of which the said Arthur Lord Chichester was likewise seised in his demesne as of fee to him and his heirs for ever" of the same. Nothing is here said of the grant in 1613 to the London Society; the whole inquisition which is held in Antrim deals with property in other counties as well and seems framed to establish not any title in the King, but to fortify the title of Sir Arthur or Lord Chichester, the King's then Lord Deputy General of Ireland. It appears by indorsement on the commission under which this inquisition was holden that it was executed in Tyrone, Antrim, Carrickfergus, Donegal, and Londonderry.

The last instrument of the reign of James I. is dated November 20, 1621. It is a grant by the King to the same Sir Arthur or Lord Chichester of a great deal of land, and also of the fishings in and soil of Lough Neagh and the river Bann down to the salmon leap with eel weares, and power to approach the banks, in the same familiar terms as appear in the earlier documents. The entire rent for the hereditaments and fisheries is 920*l.* current money of Ireland.

Detailed objections were taken to some of these grants upon the ground that there was no commission, or no sufficient commission; and, as to the commission of 1605, that it was not inrolled in the Irish Chancery till 1684. For my own part I cannot attach much importance to objections of that kind taken at so distant a date. Every legitimate presumption ought to be made in favour of old documents which have been acted upon, and these grants have certainly been acted upon in regard to the river Bann. But the whole series of instruments in King James's time, though they were not before this House in the case of *Bristow* v. *Cormican* (1), are open to criticism similar to that there employed. If the King had a title to Lough Neagh, why does the commission of 1605 say that he owned a moiety of it? Why, after granting it to Hamilton in 1605, who assigned to Chichester, was a second grant of the same thing made by the King in trust for Chichester three years later? Why did the King again make a grant of the same thing to the same Chichester in 1621? There is a minor point, that in 1613

(1) 3 App. Cas. 641.

the King made to the London Society a grant of part of the river Bann which he had, upon the documents before us, already twice granted, first to Hamilton and then to Bassett.

There may imaginably have been explanations of these inconsistencies now withdrawn from our view by the lapse of centuries. Yet they do suggest suspicion that the King's title was then regarded as infirm, a suspicion which is confirmed by what happened in the reign of Charles I.

It appears from a commission to accept a surrender from Lord Chichester dated October 21, 1639, and a surrender dated July 1, 1640, that Charles I. had appointed commissioners "for remedy of defective titles," and that there had been an order of composition on December 7, 1638, and another order of composition and agreement on September 19, 1639, between these Commissioners, on His Majesty's behalf, and Edward Viscount Chichester and his son, on the other part. Neither of the orders of composition has been produced. If they exist they would have been of much interest. It is historically accepted that there was much irregularity and unlawfulness in the proceedings of the Irish Government in the time of the first two Stuart Kings, and there were Acts of Parliament to remedy defective titles. This seems to have been regarded as a defective title. The Chichesters compounded with the commissioners on July 1, 1640, and by deed of that date surrendered the Lough Neagh and Bann fisheries to the King in return for an assurance of certain other property.

Nothing further was done with these fisheries until the Restoration except that in 1656 Oliver Cromwell granted a ninety-nine years' lease of them to Sir John Clotworthy at a yearly rent of 35*l.* rising to 44*l.* for the river, and 5*l.* rising to 6*l.* for the lough. It was, of course, invalid, even if it had not been, on the face of it, made in defiance of the law relating to the alienation of Crown property. But at the Restoration Charles II. granted the same fisheries to Sir John Clotworthy at the same rent and for the same term of ninety-nine years. This lease was dated November 15, 1660, and on July 3, 1661, the King granted the reversion to the Chichester of that day, then become Earl of Donegall. This grant recites the grant of

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King James to Lord Chichester in 1621, which we know, and the surrender by Lord Chichester, presumably that of 1640.

It is a curious fact that in the following year, 1662, Charles II. granted to the Governor and Assistants of London, successors of the London Society, exactly the same fishery in the river Bann from the deep sea to Lough Neagh (excepting the Bishop of Derry's fishery) which King James had granted to the London Society in 1613. Now this included the stretch of the river Bann from the lough to the salmon leap which King Charles II. had granted in 1660 on lease to Clotworthy, and in 1661 in reversion or remainder to Donegall. It is inexplicable.

The lease of 1660 and grant of reversion to Donegall in 1661 were the beginning of the documentary title proved in the case of *Bristow* v. *Cormican* (1), and from this point onward the documents relied upon by the now plaintiffs are, with some additions, the same as were considered and criticized in that case. It is unnecessary to repeat those criticisms, some of which remain applicable and are not answered by any fresh evidence. From this point I propose merely to summarize the general character of the deeds, which are very numerous.

From 1692 down to 1891 there are a number of Donegall family settlements, deeds of disentail or leading to uses of recoveries. In all of them fisheries are included, and in most of them the fisheries of Lough Neagh and of the river Bann are expressly mentioned (substantially in the terms of the original Royal grants) as part of the property dealt with.

From 1662 down to 1755, that is during the currency of the Clotworthy lease of 1660, and thence down to 1795, there are no leases either of fisheries in lough or in river. I say this subject to what appears in certain rental accounts which I will deal with later.

From 1795 onward there are a number of leases, grants, and assignments down to 1907, from which the following will appear.

Beginning with a lease of November 3, 1795, it is clear that the Donegalls (plaintiffs' predecessors in title) let and received large rents and sums of money for the fisheries in the river Bann. Sometimes it was eel fishery, sometimes salmon or other

(1) 3¼App. Cas. 641.

fishery. There can be no doubt that for more than 100 years this river fishery has been actually possessed, and the plaintiffs' title is quite unassailable to that river fishery. If it was doubtful it has been perfected by a long possession.

Some of the leases and grants of the river fishery also purport to let or grant rights of fishery in Lough Neagh. And there are also separate leases and grants of fishings in Lough Neagh. These require examination. It is the lough alone with which we are now concerned.

On October 1, 1803, the Marquis of Donegall let for sixty-one years to Edward May "all that the salmon trout and scale fisheries of Lough Neagh and the river Bann" with the right to fish "within the known and accustomed limits of said fisheries." The rent was 50*l.* a year, and the covenant for quiet enjoyment was "without any let, suit, trouble, denial, eviction, or interruption of, or by, the said Marquis, his heirs or assigns, or any person or persons lawfully claiming, or to claim, by, under or in trust for him or them."

On November 1, 1811, Mr. May's lease had been surrendered, and the Marquis of Donegall granted a fresh lease for sixty-one years to Sir George Hill of "the salmon trout pulling and scale fishings of Lough Neagh and of the river Bann, as far as the rock or salmon leap, in as full, ample, and extensive a manner as the same have heretofore been enjoyed by the said Marquis of Donegall and those under whom he has derived" for the purpose of fishing "within the known and accustomed limits of said fisheries as late in the tenure of the Rev. Edward May." What these limits were as regards the lough we do not know, if there were any. And the manner of enjoyment is qualified. If the Marquis had enjoyed nothing exclusive, no more would the lessee, Sir George Hill. I do not say this is an unusual covenant, but it is a cautious covenant. Perhaps caution is often necessary in dealing with titles to fisheries.

On March 31, 1829, the reversion after the expiration of Sir George Hill's lease was granted by the Marquis of Donegall to John Wallace in consideration of a sum of 600*l.* and a yearly rent of 55*l.* odd. The grant was of a lease for three lives, renewable for ever. The subject of the grant was the same

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fisheries of lough and river as had been leased to Sir George Hill, and there were the same words, both as to manner of enjoyment and limits of the fisheries.

By a sub-lease of May 31, 1837, the representatives of Sir George Hill demised to Lord O'Neill for Hill's term, less ten days, the salmon trout pulling and scale fishings of Lough Neagh and Lough Beg and the rivers and branches belonging to the same (except the river Bann) "in as full and ample a manner as the same were heretofore enjoyed by the said Marquis of Donegall and those under whom he derived, and since by the lessors."

On January 28, 1857, the Marquis of Donegall makes a fee farm grant (subject to the lease of November 1, 1811, to Sir George Hill) of the same subjects, namely, the salmon trout pulling and scale fishings of Lough Neagh and the river Bann, with the same limitations both of manner of enjoyment and limitation of fisheries. The rent was 60*l.* a year. Since 1857 there has been no grant or demise produced to your Lordships of any right of fishery for any kind of fish in Lough Neagh until the year 1905.

On July 18, 1905, Lord Shaftesbury, to whom the Chichester and Donegall title had devolved, granted a lease to O'Neill and others, the now plaintiffs. It recites the Royal grant of Charles II. in 1661, and deduces the title to Lord Shaftesbury. It then, in express terms, demises for 5000 years the eel fisheries in Lough Neagh and the river Bann. The rent is 884*l.*, and the covenant for quiet enjoyment is by the Earl of Shaftesbury "so far only as relates to his own acts and defaults."

Two subsequent leases of eel fisheries in Lough Neagh, dated October 20, 1905, and November 13, 1905, do not require comment, because they are merely made under Lord Shaftesbury's lease of the same year.

The last letting is dated February 16, 1907, and is a let for one year of "the sole right to fish for salmon trout, pollen and other scale fish" in a part of Lough Neagh at a rental of 55*l.* The writ in this action had been issued on February 9, 1907.

I must now consider the plaintiffs' contention that rent has

been paid to their predecessors in title for fishing in Lough Neagh.

There is an extract from the Crown Rental stating in effect that Lord Chichester owes 12*s.* 6*d.* per annum for the entire fishery in Lough Neagh and the river Bann, which he holds as assignee from James Hamilton. Now the grant to Hamilton is not a lease, but a grant. It does not reserve a rent, so far as we know, but states that the fisheries granted "are of the value per annum beyond reprises of twelve shillings and sixpence."

Further extracts from the Crown Rental and the Crown Receipt Book of 1659 and 1660 respectively state that Clotworthy paid a year's rent, and possibly a year and a half's rent, at the rate of 5*l.* and 35*l.* per annum, in respect of fishings in Lough Neagh and in the river Bann. It appears that some of this was also in respect of towne and lands of Lough Neagh. All of it appears to have been rent for the year 1660 or earlier. The lease under which it was paid must have been Cromwell's lease, because the lease from Charles II., fixing the same rental, was not given till November 15, 1660. Why Clotworthy paid rent after the Restoration, which was due on a lease obviously void, is not apparent.

The only other records of rent are extracts from the Donegall estate rentals from 1775 to 1817 and receivership accounts from 1844 to 1852. These contain numerous entries of rent received for fisheries in the river Bann, which are nothing to the point. Also they contain rentals payable under the various leases which I have already discussed, and, of course, add nothing to what the leases themselves tell us. But they do also contain a record of rentals purporting to be payable for fisheries in the lough itself. These are material. They are not numerous, but they shew that between 1775 and 1807 small sums were charged for fishery on parts of Lough Neagh. The places seem to have been Shane's Castle Fishery and Shane's Castle Strand, in regard to which four boats were apparently licensed at 1*l.* 10*s.* per annum for each, also "from McKenny's Point to the Blackwater Foot," of which we were not told the site, for which 8*l.* 1*s.* 4½*d.* was paid once in 1801 and again in 1807. Also there are a few entries of rent from fishery from Gartree Point to the

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Fanny Point, and from Kilmacevitt to the Bann Foot, which site cannot be traced. There are one or two entries of rent from fishery of part of Lough Neagh, without specifying where it was. These traces of letting cease altogether, so far as Lough Neagh is concerned, in 1807. Of course the leases which include Lough Neagh, whatever their importance may be, extended throughout the nineteenth century, and rent was presumably paid under them. But that is a distinct subject.

There remains for consideration the long list of legal proceedings which relate to these fisheries. What has to be said about them may be put in a short compass.

In 1771 a litigation arose between the holders of the Chichester title and the successors of the London Society, which had obtained in 1662 the grant from Charles II. already mentioned. The whole question in that case was whether the London Society had unlawfully placed obstructions in the river Bann which interfered with the fishery claimed by the Chichesters' successors. The latter alleged damage to their fisheries both in the river Bann and Lough Neagh. Both sides were interested in upholding King Charles's right to grant the river fishery, and the London Society had no interest, except it might be in regard to damages, in disputing the Chichester title to the fishery in the lough. The jury found a special verdict, affirming in substance the validity of the King's grants both of river and of lough. The verdict enters into much detail, and alleges, among other things, that the successors of Chichester were in possession of the fishery both in river and lough.

It is, upon the face of it, a special verdict carefully drawn up with legal skill. Almost certainly it was a consent verdict. It seems to me quite unjustifiable to treat that verdict as evidence against any one, except the parties to the suit, of the alleged fact that the Chichesters' successors were in possession of Lough Neagh.

There are a series of convictions for fishing in Lough Neagh several fishery at Shane's Castle in 1862 and 1868; also convictions for fishing at Toome in 1900, all on August 23, 1900; all of which recite that there is a several fishery in Lough Neagh and the river Bann. There was an appeal on the ground that

a question of title had arisen, and a conditional order granted, but afterwards on the hearing discharged, we do not know under what circumstances, but in face of what we do know it is difficult to understand how it could be said there was no question of title. All this time it is admitted that the public were freely fishing all over the lough. It is useless to regard these isolated convictions as evidence of exclusive possession in any one. They are no evidence of title. There are also records of actions and judgments in recent years, but all of them refer only to the river fishery.

I have now stated the substance of all the evidence tendered by the plaintiffs in support of their claim for a declaration that they are "entitled to the exclusive right of fishing for eels" in the whole of Lough Neagh.

They have established that they are entitled to all the fishing in the river Bann from its mouth in Lough Neagh down to the salmon leap, and their title to the river is based upon grants which also convey the fishing in Lough Neagh.

They have established that fishings in Lough Neagh have been included in their family settlements, and that since 1803 there have been leases of fishing for some kind of fish in the lough itself. Also from 1775 to 1807 there are a few records of small sums paid, or said to be payable, for fishing in some parts of the lough. There is a record of a claim for payment in the year 1619, and another payment in 1660.

There is also a record of a special verdict toward the end of the eighteenth century binding only on the parties, and most probably arrived at by consent, in which the Chichester title is found good, and it is said that the lough fisheries are in the possession of those who claim under that title.

Now this would amply support a title if it were not for the evidence given on the side of the defendants. It is quite clear from a number of affidavits that, whatever they said in their settlements and leases, or special verdicts, there never was, within human memory, any exclusive possession of this lough under the Chichester title. Indeed, the only inference is that from time immemorial any one who pleased fished there as of right and without any real interruption. The evidence is that

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800 people, or thereabouts, habitually fish in this lough under a claim of right, and that their forefathers have done so from generation to generation. It is not attempted to deny this, nor was it questioned in argument. I will assume that such a public right could not exist in law. But this fact of immemorial fishing absolutely negatives the idea that there ever has been any exclusive possession of this fishing under the alleged title.

A title must be very clear before it can be enforced, even against trespassers, for the first time if it is 300 years old and has never been accompanied by actual possession. Is this title clear? The early deeds are open to serious suspicion for the reasons I have pointed out in discussing them. The later deeds are remarkable for this feature: in no case is the fishery of Lough Neagh let by itself. It is always inserted as a subject-matter of letting together with other fisheries. There is nothing in the deeds to shew that any person was willing at any time to take a fishery of Lough Neagh alone or any part of it and to pay any money for it until the year 1907, after the writ in this action had been issued.

This is very significant. Mr. Jellett argued that no one would let the eel fishing in the lough alone, because the way of enjoying the eel fishery of the lough was to take the catch in the river. Let it be so assumed for the moment. But there is no separate letting of salmon or trout or scale fishing in the lough or any part of it down to the issue of the writ. It is always let together with something else. The title to Lough Neagh fishery is continuously claimed in the leases, as it is in the domestic documents of the family, but the claimants to this title never put it to the hazard, and no one ever pays them for it alone. The evidence most favourable to the plaintiffs' title consists of the records of the rents paid from 1775 to 1807, as appearing in the Donegall books. But they are few, ill to identify as regards site, extending over a short period, and I do not think they are of any real weight in view of the other history of these fishings.

I should be the last to depreciate the importance of maintaining ancient titles, and quieting them if they are invaded. But this is a case in which what is virtually a paper title, of great antiquity, unsupported by any satisfactory evidence of actual possession,

and resting upon documents which are open to serious criticism, is put forward in order to obtain the exclusive enjoyment of what has never been enjoyed under it before, and to displace an industry which (whether a public right can exist or not) has been carried on under the eyes of all concerned nec clam, nec vi, nec precario, from time immemorial. That seems to me to be a fact so inconsistent with the alleged title of the plaintiffs that, even if there were less room for suspicion in its origin, I cannot believe the title ever was good as regards Lough Neagh.

I have come to this conclusion upon the footing that there can be no public right in non-tidal waters. If there can, then it has been abundantly proved. But I will follow the example of Lord Cairns and refrain from expressing an opinion on that point of law.

EARL OF HALSBURY. My Lords, this is an appeal from the judgment, which was unanimous, of the Court in Ireland, and raises questions both of fact and of law. I do not myself feel that it has been of so much difficulty as that it would naturally have raised a conflict of judicial opinion which it appears to have raised in this House. The original judgment of Ross J. seems to me absolutely satisfactory. The learned judge has with great precision examined the facts brought before him, and has arrived at a conclusion which I should have thought it was difficult to question. Undoubtedly the learned judge has exhibited great care, and has with a degree of minute accuracy considered the whole question raised with the most deliberate and anxious desire to do justice between the parties. That judgment was confirmed by the unanimous judgment of the Court of Appeal in Ireland, and I should be disposed to place the greatest reliance on such a Court as was assembled for the determination of the question in debate. Of one of them—FitzGibbon L.J.—I cannot speak without considering the many occasions upon which I have had to recognize the wisdom and learning which he has ever exhibited on the Bench, and I cannot mention his name without saying how deeply I regret the loss the Irish Bench has sustained of one whose learning and acuteness might have been an example to any country in which such qualities were valued.

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I cannot myself appreciate the difficulty which is supposed here to arise. The law I think is clear, and the first question seems to be whether there is to be made any difference in the application of the law because instead of being an ordinary piece of inland water it is a lake, whose dimensions are very large, but although as regards the exact amount of land covered by water there seems to have been some difference in the quantities described, which it is difficult to understand, I do not think that can raise any difficulties of law. There are one or two propositions about which there can be no doubt, and one cardinal proposition, which seems to me to go to the whole question in debate, is that in inland waters, apart from tidal waters, there can be no such thing as a public right—meaning by the word "public" a right unconnected with any right of fishing which is capable of being described as a profit à prendre in alieno solo; and I am bound to say that I think in the judgments of the noble and learned Lords who have taken part in this discussion (although I cannot find in any of them there is a qualification of that proposition) there seems to be an effort to suggest that, although that proposition cannot be denied as matter of law, you might in effect produce the same result by the establishment of a practice to take fish by any member of the public, although it would be impossible to connect that taking of the fish with any right recognized by the law, simply because everybody who thought proper could take the fish.

Now there is one phrase in more than one of your Lordships' judgments that I think requires to be examined, and that is the phrase "claim as of right." If that means that any claim of right in the proper sense of those words has ever been set up, I fail to find any evidence justifying the use of such a phrase. No right has ever been set up, or is now set up, capable of definition, except the right of the public, that is to say of any one of His Majesty's subjects—that is no right that the law has ever recognized. Throughout one sees a disposition to question the propriety of recognizing such a law as expedient or proper to control the fishing in such an area as this. But I must for my own part deprecate any effort to make the law yield to a popular claim which does not and

cannot exist at law because one sympathizes very much with a large class of poor people who are supposed to obtain their living by the exercise of the practice of fishing in an area over which they have no legal right to claim the rightfulness of their practice. There is an old gibe on the subject, which suggests that hard cases make bad law, and I am unable to see what rational account can be given of the various acts of ownership (and I will not waste time by going through them) except that of the ownership of the area by those who have exercised those acts.

There is another phrase that I think requires exposition, and that is the phrase "a paper title." I can understand that phrase as being intended to represent what it literally would signify, simply the paper documents by which by way of narrative the title was deduced; but what is called a paper title may be evidence of seisin. Expired leases are evidence of actual transactions between man and man that will happen through centuries; and this may be not only evidence of the deduction of title, but may also constitute reasonable evidence of seisin. So that an estate having gone according to the settlements is itself evidence not only of the mode in which the title is deduced, but also proof of seisin. And again the evidence given of Oliver Cromwell's having dealt with the lake as though it belonged to the Executive Government of the time being, and having disposed of it according to his own will, seems to me to be very good evidence of his dominion over it in the character of the sovereign head of the State, although he was usurping the authority at that time, and the unlawfulness of his title seems to me to be irrelevant to the question here in debate. I am unable therefore to share the doubts which have been suggested in the course of the argument.

As Holmes L.J. most truly says, the only claim the defendants make is based on the allegation that Lough Neagh is, and from time immemorial has been, a public and common navigable inland sea, and every subject of the realm has, and of right ought to have, the right and privilege of fishing in and on the same lough.

Palles C.B., in giving judgment in an action for trespass

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to several fisheries in a place called Feumore, a part of Lough Neagh, pointed out that so far back as 1862 the Court of Exchequer in this country had decided adversely to any such right as is now claimed.

My Lords, I do not propose to go through the very long and, I think, exhaustive examination of the titles. A great many observations have been made with reference to the case of *Bristow* v. *Cormican*. (1) I say, with the utmost respect to those who decided that question, that a great many of the observations made were simply obiter. The only question there was whether or not the learned judge who tried the case should have left the question to the jury, or whether he could properly have directed the jury to find the verdict for the plaintiff. Since that case was decided, and though I think that there was evidence from which a jury might reasonably have given the verdict even in that case which the judge improperly directed them to give, no one has doubted that had it been left to the jury and they had found the same verdict which the judge directed it could not have been set aside.

As Holmes L.J. has said, Ross J. has so carefully and in such detail stated the contents of ten instruments having an important bearing on the issue, all prior to 1660, which were included in the proofs given in the hearing in the Divisional Court, and thus relieved the learned Lord Justice from the necessity of dealing with them in detail, that it certainly is not necessary for me to go through them again. But there is one of them upon which observations have been made which I think it is desirable to notice, and that is the inquisition of July 12, 1605; and the criticism has been made that it weakens the effect of the title, because Queen Elizabeth has been therein found only to be seised of half of Lough Neagh. I think what has been pointed out by Lord Macnaghten satisfactorily accounts for the use of the phrase "medietas," and certainly if anything could add to the strength of the case as proved by the plaintiffs, it would be the fact that for so many years the question of the fishing in Lough Neagh had been the subject of litigation in Ireland, with the result that no one has been found to attempt

(1) I. R. 10 C. L. 398.

any claim other than that which, as I have said, the law will not recognize.

My Lords, I do not think it is necessary for me to do more than to say I heartily concur with the judgments of Ross J. and the very strong Court of Appeal by which his judgment was confirmed in Ireland. I am therefore of opinion that the order made was right and ought to be affirmed, and I move your Lordships accordingly.

My Lords, I should have thought it right to enter more largely into the various points which have been most learnedly argued but that I have had the opportunity of reading the exhaustive judgment of my noble and learned friend Lord Macnaghten, with which I entirely concur, and which I think most lucidly deals with the whole question in debate.

LORD ASHBOURNE. My Lords, the plaintiffs in this case claim the exclusive right of fishing for eels and to all eel fisheries in Lough Neagh.

The extent of the waters over which this exclusive right is claimed attaches to the case special interest. Lough Neagh is the largest inland lake in the United Kingdom and contains in area 150 square miles. It is twenty-four miles long, is navigable and non-tidal, and is bounded by five counties. The waters, fed by thirteen rivers, converge into Toome Bay, in which lies the exit of the waters to the sea. This exit is the Lower Bann, which finds its way to the sea below Coleraine.

The lake abounds in fish—salmon, eels, and pollen. The first two are of considerable value, and pollen are also valuable and much sought after in the neighbourhood.

The defendants deny the plaintiffs' title and say that, no matter what may be their paper title, they have failed to prove that they had any real or effective title with actual possession, or that they had effectively asserted any right to an exclusive use.

The plaintiffs' right to the eel fishing in the river Bann is not in dispute; the controversy is entirely confined to the eel fishing in the lough, although the lease of July 18, 1905, also includes the eel fishery in the river.

The plaintiffs rely on this fact as having a bearing on the

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case, inasmuch as they claim the same root of title to the Bann eel fisheries and the lough eel fisheries. "This is not, however, sufficient to raise a reasonable inference that he who had possession of one part had possession of the rest." Whatever may be the opinion as to the paper title, I regard the real question of difficulty to be a consideration of how far the evidence shews possession under that title.

The evidence established, I think, that there has always been unrestricted fishing over the greater part of the lough; and that from the earliest times it was fished by the inhabitants in the vicinity, openly and without question.

Although it is pleaded, we have not been pressed at any length with the claim that, Lough Neagh being a public navigable inland sea, although not tidal, every subject of the nation has the right of fishing in it. In *Bristow* v. *Cormican* (1) the question is left aside for possible future examination, and the cautious words of Lord Cairns "that it might be a fit question to raise in some other case" are worthy of note. When the case was in the Irish Court of Exchequer, Palles C.B. (2) thought he was bound by *Blomfield* v. *Johnston* (3), but said that, "If now open to consider that question, unfettered by authority, I should deem it one that would require very grave consideration." Dowse B. on the same occasion said: "Having carefully looked into all the authorities in this country or America applicable to the question, I am by no means satisfied that the question has been thoroughly investigated. It remains for the Court of ultimate appeal to decide the question." When the case was in the Irish Court of Exchequer Chamber (4), Mr. Justice (afterwards Lord) Fitzgerald, who had been one of the judges in the case, said that in *Blomfield* v. *Johnston* (3) "The judges in the Exchequer Chamber did not all intend to affirm that the public could not have a common of piscary in large inland navigable freshwater lakes." Lord Blackburn (5), although he saw no reason why the same law should not apply to land covered by still water, and to land covered by running water, cautiously added, "at least when

(1) 3 App. Cas. 641.
(2) I. R. 10 C. L. 398.
(3) (1867) I. R. 8 C. L. 68.
(4) I. R. 10 C. L. 412.
(5) 3 App. Cas. 666.

the lake is so small or the adjoining manor is so large, that the whole is included in one property."

This case may not necessitate any direct decision on the point, as the defendants contend that the plaintiffs have entirely failed to prove any exclusive right to the fishing they claim in the lough, and that the open user by the defendants and their forefathers from time immemorial entirely rebuts the possession of any such right, no matter what papers or patents may be produced.

The plaintiffs must prove their title and shew that the Crown had acquired a title to make its grants, the open user by the public, suggesting immemorial usage, throwing upon the plaintiffs the onus of proving that their title to the alleged exclusive right was real and effective. Lord Hatherley puts it (1) : " Clearly no one has a right to say that it became vested in the Crown because it belonged to nobody else."

The plaintiffs argue that their case is powerfully supported by the absence of any other title being shewn by the defendants, or alleged by any other person. But the plaintiffs claim from the Crown, and the Crown has no prima facie right, and therefore the defendants are entitled to contend that the onus of proving their title rests on the plaintiffs, not only by production of documents, but by proof of actual use, possession, and enjoyment, sufficient to support the inference that their claim to an exclusive right is sound and irresistible. The plaintiffs also contend that this admitted use by the defendants was merely permissive, and tolerated, while the defendants entirely repudiate any such sanction for the open use of the lough fishing for centuries, and urge that if a public right is denied as the true authority, then some other legal origin may be sought, as was done in the case of *Goodman* v. *Saltash Corporation*. (2) But all through the defendants insist that, no matter what their own legal status may be found to be, the plaintiffs have not discharged the onus which rested on them of shewing actual enjoyment under their alleged title, and therefore they have no right to maintain this action.

The plaintiffs urge that it would have been difficult to restrain

(1) 3 App. Cas. 658. (2) (1882) 7 App. Cas. 633.

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the defendants from fishing in the lough and that it was not worth while; but the fishing was large and open. It occupied some 800 fishermen and maintained their families, and this vast user —perfectly open and notorious—cannot all be brushed aside by saying it was tolerated because it was not easy to grapple with, or worth the effort to try to end it. Therefore it is necessary to scrutinize with care what was the actual user of the plaintiffs of their alleged exclusive fishing right in the lough, or any part of it. Was the user enough to support their claim to own an exclusive right in the whole lough? How is the user of the plaintiffs (such as it was) to be regarded or applied? Is the open user of the defendants and their ancestors for centuries to be ignored as the result of benevolent toleration? Or shall the plaintiffs be given credit for such limited user as is capable of being ascribed to them, and their claim to the residue found to be unproven?

On the paper title I do not deem it necessary to say much, as it is discussed so fully by the learned judge who heard the case in the first instance, and by the Irish Court of Appeal which unanimously affirmed him.

The eminent lawyers who heard the case of *Bristow* v. *Cormican* (1) closely discussed the paper title and the facts before them, and came to the clear conclusion that it was for the jury to decide on the evidence whether the plaintiff had made out his case, and whether the actual user proved was adequate to support an action for trespass at Feumore.

[His Lordship stated the paper title claimed by the plaintiffs which is set forth in the Lord Chancellor's judgment and in that of Ross J.]

It is worthy of note that it was not denied that members of the public have continuously and systematically fished without controversy in every part of the lough for pollen, and the Lord Chancellor of Ireland in reference to this says: "If this case was conversant with or included an alleged exclusive right to take pollen, different considerations would apply, and I express no opinion as to what the result would be in such a case."

The Donegall rentals shew payments of large rents for the

(1) 3 App. Cas. 641.

Bann fisheries from 1775 to 1816. There are also some payments of rents in respect of what are called the lough fisheries. FitzGibbon L.J. refers to them as " small in amount, occasional and, in a sense, suspicious." The whole legal profession in Ireland will appreciate very highly Lord Halsbury's fine tribute to the memory of that great judge.

Reliance has been placed on the litigation that was undertaken by persons claiming to enforce their rights under the patent, but as the right to the Bann fishings are not at all in dispute, I do not deem it necessary to refer to it in any detail.

As regards the fishing in Lough Neagh several convictions were obtained by Lord O'Neill (who held under a sub-lease) and his successors for trespasses committed in the vicinity of Shane's Castle. There were two in 1862 and one in 1868 for trespass to a several fishery.

The case of *Bristow* v. *Cormican* (1) has been much referred to in the arguments addressed to your Lordships and is well worthy of the closest attention and the highest respect, owing to the care and eminence of the learned Lords who took part in it. The defence upon which everything turned was a traverse of the plaintiffs' property in the several fisheries and in the land covered by water. The plaintiffs proved the convictions I have mentioned, obtained by Lord O'Neill and his successors, but they could prove no acts in the neighbourhood of Feumore, where the alleged trespass occurred. A large number of witnesses were produced for the defendants, who proved that they fished both at Feumore and through the entire of Lough Neagh. The learned judge declined to leave any question to the jury and directed a verdict for the plaintiffs. The Court of Exchequer held that the question ought to have been submitted to the jury. An appeal was taken to the Exchequer Chamber, and that Court was equally divided. The case was then taken to the House of Lords (2), who unanimously decided that there was evidence that ought to have been submitted to a jury and that there must be a new trial. No new trial took place. The House of Lords held it was a jury question; and it was for the jury to decide.

(1) I. R. 10 C. L. 398. (2) 3 App. Cas. 641.

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Many additional documents are now produced, and I think that they strengthen the plaintiffs' case, although they are not all harmonious or consistent with each other. Up to the present I do not know what is alleged as the origin of the Crown title. It was probably some confiscation; but the inquisition of 1605 founded in an illegible commission only refers to a moiety of the lough, which was deemed sufficient to support letters patent granting the entire lough and going much beyond its terms.

But we must, I think, assume that sufficient evidence was given upon which the findings of the several inquisitions proved were founded. They were taken under the statute of 18 Hen. 6, c. 6, which enacted that "no lands shall be granted by letters patent until the King's title be found by inquisition." And considering the great length of time which has elapsed, I do not feel at liberty to set aside or not give due weight to the conclusions arrived at, supported as they are by other documents, and I think that, as far as paper goes, the title of the plaintiffs is made out.

But what is the inference to be fairly deduced from the evidence as to the effective use, possession, and enjoyment of the alleged right of exclusive fishing in the lough under this title? We are dealing with the largest inland lake in the United Kingdom, and in this action claiming an exclusive right of fishing for eels in this wide area what is the evidence? Ross J. finds that the evidence established "that there has always been unrestricted fishing over the greater part of the lough; and in that part of it from Shane's Castle to Toome Bay the fishing has been protected and trespassers kept off; that in the small portion of it enclosed by the walls constructed in Toome Bay at the place where the lough discharges itself into the Bann the fishing has been protected . . . . There have been no acts of ownership in respect of eel fishing in the lough since the termination of Clotworthy's lease, but the eel fisheries in the lough have always been excepted from the demises and grants of the scale fishing."

Assuming that these findings are fairly deducible from the evidence, are they sufficient to support the judgment under appeal in its integrity? I do not think so. I think that the

judgment goes too far in holding the right claimed to be established in respect of the entire area of Lough Neagh. I am of opinion that the plaintiffs have not proved an actual and effective possession of the exclusive fishing alleged in the whole lough, but they have done so not only to the line marked on the map by Ross J., but also to a line between Dunore Point and Mullan Point which would include the lough opposite Shane's Castle.

I think that this limitation is in accordance with the principle of the decision of this House in the case of *Bristow* v. *Cormican* (1), which held that it was a question of fact for a jury to say whether Feumore fishery, some miles away, was to be regarded as held under the same title and ownership as the Shane's Castle fishery and coast, where actual acts of possession and protection were proved. Lord Blackburn put it: "It was for the jury to say whether the Lords Donegall by themselves or their tenants were in possession of land covered by water at Feumore or the fishings there, and the jury might not unreasonably say that that was not proved by the evidence."

A similar question arises in this case, and I am unable as a juror to say that I am satisfied that actual and effective use or enjoyment has been proved beyond the lines I have indicated. I therefore am of opinion that the order under appeal should if possible be varied as I have indicated.

LORD MACNAGHTEN. My Lords, this is an appeal from a judgment of the Court of Appeal in Ireland affirming a decree of Ross J. which declared that the respondents, who were plaintiffs in the action, were entitled to the exclusive right of fishing for eels and to all eel fisheries in Lough Neagh for the residue of the term of 5000 years granted by a lease of July 18, 1905.

At the outset of his judgment Ross J. lays down two propositions of law. They are these: (1.) The Crown is not of common right entitled to the soil or waters of an inland non-tidal lake. (2.) No right can exist in the public to fish in the waters of an inland non-tidal lake. These propositions were accepted by the Court of Appeal. They were only faintly

(1) 3 App. Cas. 641.

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questioned at the Bar. Speaking for myself, I heard no argument tending in the slightest degree to shake their authority. I think they are incontrovertible. I may add that in my opinion there can be no difference in this respect between a small lake and a lake so large that it may be termed an inland sea. In this country one and the same law applies to inland non-tidal waters, whatever the size of the water space may be.

The appeal is in reality an appeal from two concurrent findings of fact. In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong. In a Scotch case, *Gray* v. *Turnbull* (1), where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither Court saw the witnesses, Lord Westbury, after referring to the practice in Courts of Equity to allow appeals on matters of fact, makes this observation: "If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever." In an English case, *Owners of the P. Caland* v. *Glamorgan Steamship Co.* (2), Lord Watson expressed himself as follows: "In my opinion it is a salutary principle that judges sitting in a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at,—I will not say a certain, because in such matters there can be no absolute certainty,—but a tolerably clear conviction that these findings are erroneous, and the principle appears to me especially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability." Now here there are concurrent findings of fact, and in a great measure these findings rest upon considerations of probability, upon inferences to be drawn from documents of ancient date the precise bearing and exact significance of which no one living can explain thoroughly. I do not pursue this subject further, because I do not think it is necessary to invoke the principle which Lord Watson described as "the rule of this House." I mention it in passing lest this case should hereafter be cited as a case in which the principle was altogether ignored. At the same

(1) (1870) L. R. 2 Sc. & D. 53. (2) [1893] A. C. 207.

time I confess that it does seem to me no light matter to put aside the unanimous decision of two Courts, and the deliberate opinions of judges second to none in ability and learning, and peculiarly conversant with Irish titles and the law of real property in Ireland.

My Lords, if it had not been that some of your Lordships, to whose opinions I would gladly defer, take an opposite view, I should content myself with adopting the judgment of Ross J. and the judgments of the learned judges in the Court of Appeal. As it is, without going through the case from beginning to end, I will venture to add a few observations, avoiding, as far as I can, recital of facts and repetition of arguments with which your Lordships by this time must be only too familiar.

Before I come to the substance of the respondents' case, I cannot help saying a word about *Bristow* v. *Cormican* (1), on which I think more time was expended than on the facts of the case now under appeal. No one can quarrel with the decision in *Bristow* v. *Cormican.* (1) But the only question in that case, as Lord Cairns says, was whether the course taken by the learned judge at the trial was the right one or not. Was the learned judge, asks his Lordship, right in treating the title to the fishery as a question of law to be withdrawn from the jury, and to be decided by the Court, upon the construction of the documents before it, or did the title of the plaintiffs depend to a greater or less extent upon the proper view to be taken of questions of fact, which facts ought, therefore, to be left to the jury?

The action was brought for trespass on the plaintiffs' several fishery at a place called Feumore, in the barony of Upper Massareene, many miles away from the only place where the plaintiffs had attempted to prove possession. Of a fishery at that particular spot the plaintiffs, as Lord Cairns says, had not, nor so far as the evidence went had they ever had, "actual physical or mechanical possession." "If," his Lordship adds, "they had had possession of this kind for however short a period it would, as against a trespasser, have been sufficient; but they had none. They therefore proceeded upon their documentary or paper title." Then his Lordship goes on to criticize the documentary title,

(1) 3 App. Cas. 641.

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which, in that case, was presented in a very incomplete and fragmentary fashion. The criticism was perfectly just; but I cannot see what it has to do with the present case, where there is, at least according to my view and the view of the learned judges in Ireland, ample evidence of actual possession in various places all over the lough. On turning to the report in *Bristow* v. *Cormican* (1) one thing seems clear, and that is that if the matter had been submitted to the jury and the jury had found in favour of the plaintiffs upon the evidence, scanty as it was, the verdict could not have been disturbed. The learned judge at the trial was asked to nonsuit the plaintiffs. He refused. Every one of the judges below agreed that he was right in so refusing, for "there was," as Lord Blackburn says, "evidence in support of the plaintiffs' claim proper to be submitted to the jury." "In this," adds Lord Blackburn, "I quite agree, and I believe no one of the noble and learned Lords who heard the argument doubted that this was so."

My Lords, I will not weary you by recapitulating or reviewing what has been called the paper title. It seems to me to be deduced in a satisfactory manner to the lessors of the present respondents. Infinite labour and excellent learning have been expended on the law relating to grants from the Crown, on patents, on commissions, and on inquisitions. To my mind the pinch of the case does not lie there. Agreeing with Holmes L.J., I must say I am rather surprised to find the title as complete as it is. At the same time I have no doubt that lawyers less learned than those to whom we have had the pleasure of listening would not have much difficulty in picking holes in it here and there, either because there may be something missing which cannot be supplied after the lapse of centuries, or because it is not proved that formalities, adjudged necessary in other cases, have been duly observed in this.

But after all, what does that matter? Every title in Ulster, so far as I know, begins with what people nowadays, better instructed in the principles of morality than their forefathers, would call usurpation, oppression, and wrong. Every title in Ulster has its origin in possession, and generally in possession

(1) 3 App. Cas. 641, 665.

taken by force. According to the temper of those old days the Antrim chieftain was not far astray when he rejected the gracious offer of a grant from the Crown, saying that he had no mind to hold by a sheepskin what he had gained by his sword.

We know what the Donegal patents purported to grant—the river Bann from the salmon leap to Lough Neagh, the fishery of Lough Neagh, and the soil and the islands thereof, Coney or Conny Island and Rams Island. The terms of the grant are plain. The real question, in my opinion, is not whether the Donegal patents are without a flaw, but whether possession has been held by the Donegal family in accordance with the express terms of the grant.

Before I pass from the paper title I may perhaps be forgiven for attempting to clear up one difficulty on which much ingenuity was bestowed. There is an inquisition which finds that Queen Elizabeth was entitled to one half of Lough Neagh. "How can you claim the whole," it was said, "when Her Majesty did not pretend to more than one half?" Lord Justice Fitz-Gibbon cuts the knot by saying that medietas does not mean one half. There, I think, his Lordship is wrong, but it is the only mistake, if it be a mistake, that the Lord Justice has made. It seems to me that the difficulty may perhaps be solved by a glance at any map which shews the boundaries of the counties bordering on Lough Neagh. The inquisition was an Antrim inquisition. The jurors could only deal with Her Majesty's possessions in Antrim, and the fact is that one half of Lough Neagh and no more does lie within county Antrim. The inquisition itself refers to an inquisition taken in county Down only eight days before. Probably there were other inquisitions dealing with the rest of the lough.

Now I come to what seems to me to be the substance of the case. The patentees, although they had granted to them all manner of fish, never concerned themselves with any fish but salmon and eels. Why should they? The salmon fisheries and the eel fisheries in the Bann are very valuable. In former days they were vastly more productive than they are now. No one who had eel weirs on the Bann would have dreamt of trying to catch eels in the lough. Every eel in the lough must find its way to the sea by the river Bann. The Bann is the only outlet.

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Nor would any one possessed of the Bann eel weirs have thought of interfering with eel fishing in the lough so long as it was carried on by line fishing. The injury that line fishing in the lough can do to the eel weirs is infinitesimal. In that interesting account of the cause of *Donegall* v. *Hamilton* (1) contained in Mr. Babington's "Concise View," to which both parties referred, the author, who was the solicitor of the Irish Society, writing in 1801, states that Lord Donegal had no less than twenty-eight weirs for the taking of eels on different parts of the river between the lough and the salmon leap, and that in one of those weirs, and that not the best, but with respect to which he was best able to procure proof, 80,000 eels were caught in one night, worth 5*l.* a thousand. Is it conceivable that persons who were catching eels by thousands would interfere with poor fishermen who were catching a trifling number on long lines? Even if it could be supposed that the patentees were so unreasonable as to wish to interfere with line fishing, interference would be practically impossible. Fishermen know by their landmarks or by corks and floats where their lines are set. Strangers not in their secrets would have some difficulty in finding the place, and I need hardly add that a search for lines set by the fishermen would be a venture of no little danger to life and limb, and would provoke reprisals. It is a different thing altogether when the line fishermen adopt a novel practice and take to fishing for eels with nets of an illegal mesh, immediately above the Toome eel weirs. That means ruin to the eel weirs, or else recourse to law.

It seems to me that in the arguments on behalf of the appellants there was some misapprehension as to the value of salmon fishing in Lough Neagh. The notion seemed to be that because Lough Neagh is a large expanse of water salmon must be abundant in every part of it, and, in fact, that if you dipped a net in anywhere you would, or might, catch a salmon. That is not the case at all. Of all lakes in the kingdom communicating with the sea Lough Neagh is, I suppose, nowadays at any rate, the very poorest fishing ground for salmon that can be imagined.

(1) 1794. Narrative of the Fishery Cause in Appendix to Concise View of the Origin, &c., of the Irish Society, by D. Babington. And see (1795) 3 Ridg. 267.

There is no evidence that there is or ever has been angling for salmon in Lough Neagh, or that any human being has ever caught a salmon there with rod and line. There is no suggestion that anybody, except the respondents and their predecessors in title, ever claimed a right of fishing in Lough Neagh by any right known to the law. There is no evidence that the fisherfolk fishing for pollen have ever caught salmon in the lough in their nets. Of the thirteen rivers that fall into the lough three only can be called salmon rivers. In Antrim there is the Main, which runs through Shane's Castle Park. There is the Upper Bann in Armagh, and the Blackwater, which is the boundary between Armagh and Tyrone. Now wherever there is an old fishery worked by draft nets, whatever the extent of the fishery may be in the description of it, you will always, I think, find some particular place to which in practice fishing has been from time immemorial confined, and there is usually, if not always, a green attached to the fishery—so attached from time immemorial—where the fishermen spread their nets. Salmon fishing in Lough Neagh has fallen off so much during the last 200 or 150 years that it would be difficult, if not impossible, to ascertain now where "the known and accustomed limits" of the fisheries comprised in the Lough Neagh fishery were, except that it may be assumed with tolerable certainty that the mouths of the three salmon rivers I have mentioned must have been among the places so described, for there or thereabouts the salmon would gather, especially in dry seasons, before running up to spawn. This, I think, is borne out by entries in the Donegal rent books.

As to possession it has been said in this House that "it must be considered in every case with reference to the peculiar circumstances . . . . the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession." This is what Lord O'Hagan said in *Lord Advocate* v. *Lord Lovat.* (1)

(1) (1880) 5 App. Cas. 273, 288.

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Now the evidence as to possession falls, as it seems to me, under three heads. First, and most important of all, in my opinion, is the evidence afforded by the great case of *Donegall* v. *Hamilton* (1) (which Mr. Babington calls the cause of Lord Donegal against the Irish Society) and the final decree passed in that cause. Secondly, there is the evidence of old lettings, which, considering the circumstances, seems to me to be extraordinarily full and complete. And, thirdly, there is some evidence as to the islands of the lough, which were held undoubtedly at one time by the same title as the fishery in the Bann and the fishery in the lough. The evidence on the third head is extremely meagre, but I should think there could be no difficulty in supplementing it if a question should ever be raised as to the right to fishing in the lough for fish other than eels. The two islands are islands of some note, and I should think of far more value than the salmon fishery in the lough. There is a round tower on one, and on the other the residence, or the occasional residence, of a well-known gentleman. It seems to me that in that quarter there may be found more certain proof of possession under the Donegal documentary or paper title than is afforded by entries in the Donegal rental books.

The cause of *Donegall* v. *Hamilton* (1) in one shape or another lasted for thirty years. It was one of the hardest fought and most famous cases tried in Ireland during the eighteenth century.

The Clotworthy lease expired in 1755. During the currency of that lease the Donegal archives would not, of course, contain evidence of actual fishing in the lough. The then Earl of Donegal attained his majority in 1761. In 1771 the first action of *Donegall* v. *Hamilton* (1) was brought. The defendant to the action was Sir Henry Hamilton, who was lessee under the Irish Society of their fishery from the salmon leap to the sea. That fishery in old times was worked by nets at the Cranagh between Coleraine and the sea, where the principal fishing is still carried on. Besides the Cranagh fishery, men were employed in ancient times to stand on the rocks at the salmon leap, to catch fish with loop nets when the river was not in a favourable state for net

(1) 3 Ridg. 267; Babington's Concise View, Appendix, p. 195, ed. 1832.

fishing. But as few were skilled in this art and as fish were then very cheap, the expense, as Mr. Babington says, nearly equalled the gain. Shortly after the passing of the society's patent in 1613—the patent which was afterwards revoked, the society made a cut through the rock close to the Derry shore, for the purpose of conveying timber down the river to build the town of Coleraine. About the year 1620 the society's fishing tenant used the cut as a trap for catching salmon. Other traps were afterwards constructed on the surface of the rock. Of these there were five in all. The fifth was constructed in 1760. Lord Donegal's complaint was that the construction of these traps injured his Lough Neagh fishery in the county of Armagh, and the venue was laid in that county. Probably Lord Donegal's advisers did not wish to have the case tried in the county of Londonderry, as the Irish Society were all-powerful there. Armagh was probably chosen because it was easily accessible from Dublin, and because there was, as I presume, at that time no difficulty in proving that the several fishery which the Donegal family claimed under their grant was exercised and profitable in the county of Armagh.

The first trial was a trial at Bar. A trial at Bar was granted by the Court because it was represented that much would turn on the old patents. A special verdict was found. But when a motion was made upon the verdict, it appeared that Lord Donegal had not proved that he was successor in title to the Earl to whom the grant was originally made. So a new trial was directed. Then Sir Henry Hamilton died. The second action was brought against his widow, Lady Hamilton, to whom Sir Henry's interest in the fishery was bequeathed. That again was a trial at Bar, and again a special verdict was found. Then it was discovered that Sir Henry, after the date of his will, had obtained a freehold interest in the fishery. And, consequently, his interest in the fishery did not pass to his widow, but devolved on his heir-at-law. So that trial became abortive. Then the heir-at-law conveyed the fishery to the widow, and the third action of *Donegall* v. *Hamilton* (1) was brought against Lady Hamilton. In all three actions the gist of the action was injury to the plaintiff's Lough

(1) *Hamilton* v. *Donegall*, 3 Ridg. 267; Babington's Concise View, Appendix, pp. 204, 205, ed. 1832.

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Neagh fishery in the county of Armagh. In the third action the Court refused to allow a trial at Bar, and the action was tried at the Armagh Assizes before the circuit judge and a jury of the county, who presumably must have had some knowledge of Lord Donegal's title to the fishery in Lough Neagh, and the manner in which his fishing rights were exercised in Armagh. The most eminent members of the Irish Bar were engaged in the case. The leading counsel for the Irish Society, who, though they were not nominal defendants, fought the case on behalf of their tenant, was the Attorney-General Fitzgibbon, afterwards Lord Clare and Chancellor of Ireland. He went to the assizes, as he says himself in the Irish House of Lords, "for the very purpose of shewing that Lord Donegall had no title." The Attorney-General took on himself the whole conduct of the cause. The battle lasted a whole day, and late in the evening a special verdict was agreed upon, by which Lord Donegal's title to a several fishery in the lough and in county Armagh was admitted, and the damages were agreed at 45*l.* in the event of the plaintiff ultimately succeeding.

The special verdict was argued several times in the Court of Exchequer, where judgment was given for the plaintiff, Lord Donegal; one learned judge, who had been counsel for the defendants, dissenting.

A writ of error was then brought by Lady Hamilton into the Court of Exchequer Chamber, where judgment was pronounced in 1794. Lord Clonmell, Chief Justice of the King's Bench, and Lord Carleton, Chief Justice of the Common Pleas, gave their opinions in favour of Lord Donegall. The Chancellor, Lord Clare, was of a different opinion, but, declaring that he would not decide against the opinions of the two Chief Judges, affirmed the judgment.

A writ of error was then brought in the House of Lords, and after a prolonged argument the following questions were put to the judges:—

"1st. Whether the keeping, maintaining and continuing the cuts, weirs and traps by the defendant in the Court below, as stated and alleged by the declaration, and found by the verdict, will enable the plaintiff to maintain his action?

"2nd. Whether the injury complained of by the plaintiff arising to his fishery in the county of Armagh, as stated and alleged by the declaration, and found by the verdict, will enable him to maintain his action?

"3rd. Whether upon the whole record it appears, that a cause of action has arisen to the plaintiff within the county of Armagh?"

Crookshank J. delivered the unanimous opinion of the judges as follows: "First we are of opinion that the keeping, maintaining, and continuing the cuts, weirs, and traps, by the defendant in the Court below, as stated and alleged by the declaration and found by the verdict, would not, independent of the injury complained of by the plaintiff arising to his fishery in the county of Armagh, as stated and alleged by the declaration and found by the verdict, enable the plaintiff to maintain his action. Upon the second and third questions we are unanimously of opinion in the affirmative."

On consideration the judgment was unanimously affirmed in the House of Lords, the Lord Chancellor stating that he was extremely happy that he had paid that attention to the opinion of his learned assessors in the Court of Exchequer Chamber which it deserved, adding that he was satisfied from the unanimous opinion of the judges that he was wrong and that they were right.

Now that was a final judgment pronounced by the highest Court of Appeal after a prolonged contest, in which the Irish Society spared no expense and took the utmost pains to defeat the claim of Lord Donegal. It was of vital importance to them to maintain the cuts which Lord Donegal sought to have abated. The ground of the decision and the gist of the action was the right of Lord Donegal to a several fishery in the whole of the lough, and particularly in that part of it which was in the county Armagh. Such a judgment, in a case where the proceedings were regularly conducted and there was no pretence of collusion, is entitled to the utmost weight, and better evidence of possession than any old lease can be. See *Neill* v. *Duke of Devonshire.* (1)

(1) (1882) 8 App. Cas. 135.

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It was suggested, or rather hinted, that this controversy was only a stage battle, and that while there was all this brave show of fighting the friendly combatants were only engaged in fortifying their several positions against the common enemy—the public. Nothing, I think, could be more opposed to the truth and reality of the case.

Then there is the evidence of lettings of the fishery in Lough Neagh. It was said that this evidence is meagre and unsatisfactory, and that it is to be disregarded, especially in those cases where no rent was actually paid. Is that so? I confess that unless one is prepared to agree with the arguments of the learned counsel for the appellants, that the Donegal people were all along scheming to appropriate property which was not theirs, I should have thought that these entries represented real transactions, and that the reason why no rent was paid was that the rents stipulated for were probably rents depending on the profits of the venture, and that the profits were not sufficient to pay the expenses. But there are entries of lettings for which rent was paid. These entries were brushed aside because it was said that it was difficult, if not impossible, to identify the locality. Surely that is a mistake. I will only take three entries. One is a letting of the fishery of Lough Neagh from Kilmacevitt to Bann Foot. Everybody knows where Bann Foot is. It is the mouth of the Upper Bann; and Kilmacevitt is in the county of Antrim and it is mentioned as the "Cinament of Kilmacevet" in the Antrim inquisition of 1605. Then there is the letting of part of Lough Neagh fishery from McKenny's Point to the Blackwater Foot. Well, there is no difficulty in finding the Blackwater Foot. Whether McKenny's Point is in county Tyrone or county Armagh, each of those two entries to which I have referred represents a fishing in the county of Armagh, and goes some way to prove that the claim to a several fishery in county Armagh was a real and substantial claim, which the jurors of the county, in the case of *Donegall* v. *Hamilton* (1), must have known perfectly well. Then there is an entry of fishery of Lough Neagh from Gartree Point to the Fanny Point, including Ram's Island, for which rent was actually paid. I

(1) 3 Ridg. 267

agree with FitzGibbon L.J. in thinking that this is the most important, or one of the most important, entries produced in evidence. It shews that Ram's Island was actually let with that fishery in July, 1800, and that Ram's Island, to which the title was originally the same as the title to the soil of Lough Neagh, was then in the possession of the Donegal family. Lastly it seems to me that the sub-lease to Lord O'Neill in 1837 is a most important document. A riparian proprietor takes a lease of an alleged several fishery, including that part of the fishery which is ex adverso his own lands. It does not seem to me to matter in the very least whether he had or had not in his mind the notion that a lease under the persons who claimed to be proprietors of a several fishery in the whole of the lough would add to the security of his demesne and the protection of his river or not. I may remind your Lordships that this sub-lease and the actings under it, which were confined to one corner of the lough many miles distant from the place where the alleged trespass in the case of *Bristow* v. *Cormican* (1) was said to have been committed, were the only evidence offered in *Bristow* v. *Cormican* (1) to prove possession of the whole of the lough. It was evidence, says Lord Blackburn, but it was for the jury to say what weight was to be attached to it. Here the sub-lease of 1837 and the actings under it are a very small portion of the mass of evidence submitted in proof of possession.

As regards the third head of evidence—possession of the two islands under the same title as the fishery—I have already referred to the only instance I can find in the papers before the House.

Perhaps I ought to say a word about May's lease. For my part I think it is a very unimportant document. In *Bristow* v. *Cormican* (1) an importance was attached to it which I think it did not deserve, apparently because the common expression "within the known and accustomed limits" of the fishery was supposed to have a mysterious meaning, which I must confess I do not quite understand. I do not for a moment suppose that either May or Sir George Hill ever fished or ever meant to fish in Lough Neagh.

(1) 3 App. Cas. 641.

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The reference to the fishery in Lough Neagh in both those leases had, I think, no other object than the putting on record the claim of the Donegal family to the fishery of Lough Neagh. But when we know that the right or claim of the Donegal family to the several fishery of the whole of Lough Neagh had been asserted openly, and had been the subject of a litigation which lasted for thirty years, just before the date of the lease to May, the notion that there was anything surreptitious connected with May's lease is, I think, not within the region of probability, and the suggestion of forgery, or something like forgery, which was made at the Bar is, I think, quite unfounded. Your Lordships saw this unhappy document. There is writing upon an erasure. That is patent to any one who looks at the document. But the writing on the erasure is obviously in the same handwriting as the rest of the instrument. In my opinion there is not the slightest ground for supposing that the document was tampered with after its execution.

The document is a document very carelessly prepared, at any rate. It purports to grant the fishery in the whole of the river Bann, not merely in that part of the river which extends from the lough to the salmon leap. And if, as was suggested by the learned counsel, it was originally a lease of the Bann alone, it is more extraordinary still, for it describes the Bann as being in the county of Tyrone as well as in Antrim and Londonderry. And I suppose the Bann was never in Tyrone since the days of the Flood. I think both May's lease and Sir George Hill's lease, in which the blunders in May's lease are corrected, may be left out of the question altogether. It looks as if Hill's lease was really intended to be effective only for the purpose of angling in the Bann.

I would venture to add one word in conclusion. I do not think that the result of this appeal, whatever it may be, can affect any question between the pollen fishermen and the claimants to a several fishery for all kinds of fish in the whole of the lough. Pollen fishing is no doubt a considerable industry in that part of Ulster. But there is not, I should think, the remotest probability of persons interested in salmon fishing or in eel fishing interfering with it or with fishing for coarse fish in the lough. For

one thing, it could not pay to interfere. That sort of fishing is an industry that can only be followed with profit by men who toil at it themselves for their daily bread. It cannot be exercised vicariously with any hope of profit or advantage.

For the reasons assigned by Ross J. and the learned judges of the Court of Appeal in Ireland,—no mean judges, I think, on the question of title to Irish property—and for the reasons which I have ventured to add, I think this appeal should be dismissed with costs.

LORD DUNEDIN. My Lords, the question which I feel bound to put to myself in this case was settled by the judgment of this House in *Bristow* v. *Cormican* (1), and has, I think, been accurately restated by Ross J. and by Holmes L.J. in the judgment under appeal.

I do not understand that any of your Lordships has any doubt as to the sufficiency of the title in the plaintiffs from a conveyancing point of view. The patent of 1661 gives in terms the fishing in the lough to Arthur, Earl of Donegall, and the transmission of title to the present plaintiffs from him is unimpeached. The whole controversy turns on whether, so far as the fishings in the lough are concerned, the Crown had them to give. As fishings in a freshwater lough do not belong to the Crown jure coronæ, it is a question of fact whether the Crown had them. It is obvious that direct proof of possession before 1661 is impossible; the matter, therefore, becomes one of inference to be drawn from the whole facts proved, and the question, as often said, is a jury question.

Now in addressing myself to the best of my ability to that question, I confess at once that I am quite unable to hold, like my noble and learned friends the Lord Chancellor and Lord Ashbourne, an open mind on the question of whether there can or cannot be a public right of fishing in such a place. I do not think Lord Cairns did so in *Bristow* v. *Cormican*. (1) All that he said was to point out that the question having been raised and decided (adversely to such a possibility) on demurrer in that case, and that judgment not having been appealed, it was

(1) 3 App. Cas. 641.

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impossible to raise it before the House. Lord Cairns did not have to consider the question of the title as a juror. All that he decided, and that this House decided, was that it was a question for a jury. If he had had to consider the question as a juror, I am humbly of opinion that he would have had to begin, as I do, by making up his mind, if he had any doubts on the subject. I question if he had.

The reason which, in my opinion, makes this step imperative is that it seems to me that the possibility or impossibility of the public having such a right completely alters the standpoint from which we ought to view the actual fishing by the public. Tolerance in the one case is difficult, in the other is easy to suppose.

There is a well-known illustration in an analogous matter. Proprietors often admit indiscriminate trespass on their property. In the case of those who have large tracts of uncultivated land trespass to a certain extent is universal. They know they have nothing to fear because a general right of trespass cannot be acquired, and they will only interfere when the trespass is such as to cause actual damage or annoyance. But if the public are seen to walk in a certain line from one public place to another, any proprietor knows that if he allows that to go on unchecked for a sufficient period it will be held that his non-interference was not due to tolerance, but to his consciousness that there was a right of way between the two places.

As to the question itself, I confess I have no doubt. It seems to me to be conclusively settled by authority. I need only cite *Murphy* v. *Ryan* (1) and *Smith* v. *Andrews*. (2)

None of the learned judges in the Courts below have the slightest doubt on the point, and it is stated as a commonplace in the text-books of the law. It is true that it does not seem to be actually so determined by a judgment of this House. But to hold that one of the fundamental doctrines of real property can be called in question because it has not been in terms laid down by a judgment of the House of Lords is, in my opinion, to invest the judicial proceedings of this House with an authority to which they are not entitled. The A B C of the law is

(1) I. R. 2 C. L. 143.

(2) [1891] 2 Ch. 678.

generally not questioned before your Lordships, just because it is the A B C.

Starting, then, from the position that the public never had, and never could have, any right of fishing in a freshwater lake, the next consideration in my mind is, Was it possible for the Crown to have such a right? It is not, as already mentioned, one of the rights of the Crown jure coronæ. But no one doubts that the Crown could acquire such a right, either by transference or, much more probably, by forfeiture. Naturally the most cogent evidence, which indeed would be conclusive, would be an Act of Parliament vesting the fishing by name in the Crown. No such Act is here forthcoming. But we do know that the Crown acquired lands by extensive forfeitures in Ulster in the times of Elizabeth.

The 11th Act of Elizabeth forfeits a vast number of lands which belonged to the O'Neills and their adherents. In short on this matter Mr. Jellett, in his interesting argument, convinced me that although it was impossible to point to any forfeiture which identified the lough, yet it was obviously very probable that the lough was included in the various territories forfeited to the Crown in the times of the O'Neills. Ross J. took, I think, the same view. I would also draw attention to the form in which the forfeiture is expressed, "That your Majesty, your heirs and successors shall have hold possess and enjoy *as in right of your Imperial Crown of England* the County of Tyrone the County of Claneboy" &c. It seems to me that if at the times of the inquisitions which are mentioned there was identification of the particular lands or fishings with lands and fishings forfeited in general terms, then the finding of the jurors was an echo of the statute. I, therefore, do not draw the inference which one of your Lordships, in an opinion which I have had the advantage of perusing, is somewhat inclined to draw, namely, that the jurors made a finding based upon an erroneous view of what the jus coronæ included. The episode of the Smiths does not in any way disturb my view. Although the Act 11 of Elizabeth forfeited large tracts of land, it did not reduce them into the peaceable possession of the Queen. The indenture to the Smiths was dated two years afterwards, and it made a conditional grant of what was in the Queen in

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certain parts of the land. The Queen's title is not dependent on the Smiths; it rested on the 11th Elizabeth. Neither in the indenture of 1571 nor in the inquisition of 1605 is there any identification of the fishings of Lough Neagh with the lands granted to the Smiths. It is immaterial, in my view, whether they are or are not so included. For the Smiths did not perform their part of the covenant, and so the grant never took effect, and the jurors in the inquisition clear it out of the way. This leaves untouched their earlier finding relating expressly to the fishings usque ad medietatem; a limitation which does not lead me to the inference that the Crown had not the whole fishings, but is explained by the fact that the inquisition was an Antrim inquisition, and that the jurors have been therefore locally limited.

The next consideration is that if the right to the fishing was not in the Crown, then it must have been in the hands of some private individual or individuals, presumably the riparian proprietors. The only other alternative would be to hold that the fishing of this great lake was derelict or belonged to no one—a proposition which I understand to be contrary to law, as North J. says in *Smith* v. *Andrews*. (1)

Accordingly I approach the evidence in the light of three propositions, which I formulate as follows: (1.) The public cannot have a right to the fishing in question. (2.) The Crown may have had a right to it when it granted the patent. (3.) The only competitor to the Crown and its patentee must be some other private owner or owners. (To make this theoretically complete I would have to add corporation or quasi-corporation, but of such ownership there is neither suggestion nor trace.) I am not forgetting the fact that it is for the plaintiff to prove his case.

That the Crown affected to have the right cannot be doubted. The patent to Hamilton of 1605; the patent to Lord Chichester of 1621; the commission for the surrender in 1639, all shew this conclusively. Nor am I disposed to minimize the weight of the Protector's lease to Clotworthy. The Protector would be little likely to deal with anything unless he believed, on evidence available at the time, that it belonged to the Crown. And then

(1) [1891] 2 Ch. 678.

comes the patent on which the plaintiffs' title really rests, namely, that of 1661. It is next to be noted that so far as the titles are concerned the fishings of the river are linked with that of the lough. I do not think that what is conveniently called the unum quid principle can be pushed so far as to make evidence of possession of the river serve as evidence of possession of the lough. The river and lough have not, in my opinion, that "common character of locality as to raise a reasonable inference that he who had possession of one part had possession of the rest." (The words are those of Parke B. in *Jones* v. *Williams* (1), as adopted by Lord Blackburn in this House in *Lord Advocate* v. *Lord Lovat.* (2))

But nevertheless, when we find that the Crown's title to the river has been held unimpeachable (for no one suggests any originating title to the present holders except the grant from the Crown by the same patent of 1661), it goes far to suggest that the grant as to the lough was something more than a mere paper grant.

Still I agree that, following what was laid down in *Bristow* v. *Cormican* (3), we have to look for evidence of possession by the Crown in 1661. Direct evidence is impossible. We can only judge by inference from the acts of the Crown patentees at subsequent periods. These acts must point to possession, and if we find possession in them it is admissible to infer that there was equally possession at the time of the granting of the patent. But possession is searched for, as I understand it, as the badge, not as the measure of the right; and it is because of that that I think it is so absolutely necessary to make up one's mind as to the soundness of the first and third propositions which I have ventured to lay down.

It is this that makes the entries in the Donegall rentals so important. I do not go through them. They are not, I admit, (if you exclude the river) at all considerable in extent. But they certainly relate to various parts of the lough. Now if possession was the measure of right, this would fall far short of what was necessary. But if possession is only sought for as the

(1) (1837) 2 M. & W. 326. (2) 5 App. Cas. 273, 313.
(3) 3 App. Cas. 641, 669.

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badge, there is the fact that the Donegall family, who admittedly have no separate title to particular bits of the lough, get money from other people by giving them limited rights in all different parts of the lough. It is necessarily of no moment that the limited rights are not rights to fish for eels. It is common ground that a right of fishing includes all sorts of fish; and the reason why grants of eel fishings in the lough were not to be met with is easily explained by the known habits of the eel. Upon that I may perhaps here say that the last word of the scientists—largely based upon special researches by Schmidt—is not entirely in accordance with the description of the breeding of the eel given by the learned judges in the Courts below. It seems to be proved that the eel spawns not in brackish water, but in certain deep portions of the ocean where a certain temperature and pressure are obtainable. But apart from that, it is certain that the eel enters a freshwater lake like Lough Neagh small and leaves it large for the purposes of breeding; and that the eels congregate in large quantities to leave it in stormy nights in the autumn. It is equally certain that to those who had the command of the river it was useless trouble to fish in the lough, and that fishing for eels in the lough itself for any really remunerative purpose was impracticable till the recent invention of a long and small-meshed net employed as the learned judges describe.

Besides the entries in the Donegall rentals, we have also the much larger lease grants of May and Hill. It is true that in May's lease the words "and lough" are written on an erasure. That might make the document a bad one if there was a contest upon it at the instance of the lessee against the lessor. But I confess I do not understand the theory of a forgery. Who was to forge? Surely not Lord Donegall, whose own title from the Crown had clearly the lough included. May might conceivably forge in order to enlarge his grant; but I should have thought that he could scarcely hope to escape detection. On the whole, I think the theory of a clerk who had written the words wrong, and did not wish to be chidden, or to have to buy a new sheet of parchment, is a conjecture much more likely to be near the truth.

Anyway there is no erasure in Hill's lease; and the fact is that he was content to pay money for what the Donegalls assumed to give, namely, inter alia, fishing in the lough. Besides this there is the uninterrupted repetition of the right in the Donegall settlements. By itself this is not much. But at least it shows a continued belief in the family that the fishing was theirs.

Reverting again to what I said as to possible competitors, there is surely no more substantial proof that such competitors do not exist when we find a lease of fishings in the lough taken from the appellants by one of the riparian owners themselves.

None of these matters separately would prove the case. But the question is, what is the weight of the cumulative evidence? To my mind as a juror I am compelled to come to the conclusion that the title given by the Crown in 1661 was not a mere paper title, but a real title; that the grantees have, through the lessees, always used that title to effect by possession in various parts of the lough; and that no competitor has ever appeared to challenge their proceedings. It comes back, therefore, to this: Does the fact that the public have undoubtedly fished continuously and universally for pollen, and sometimes for eels, prevent me drawing the inference which I now draw? I think not, for the reasons stated by Bowen L.J. in *Blount* v. *Layard* (1) and quoted by North J. in *Smith* v. *Andrews*. (2)

I take the facts as they are stated by the learned judges in the Courts below. I think it is clear (1.) that pollen fishing could never have been made profitable by the patentees; (2.) that the eel fishing as practised till the recent introduction of the new net was casual and immaterial.

Upon the whole matter, therefore, I think this appeal should not be allowed. I confess that to me it would be no light matter on such a subject to overrule the unanimous judgment of the judge of first instance and the Court of Appeal. It is true that this is an appeal on the merits, and that I do not treat the verdict of the learned judges below in the same way as I should be bound to treat the verdict of a jury.

Nevertheless their opinions are not only worthy of respectful

(1) [1891] 2 Ch. 681, n. (2) [1891] 2 Ch. 678, 702.

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consideration at all times, but in the present instance bear in themselves the marks of most learned and careful consideration. I should have been quite content to say that I agree with the opinions of Ross J. and Holmes L.J., who have expressed themselves in a manner entirely satisfactory to my judgment. I have only added these remarks of my own as I know there is a difference of opinion among your Lordships, and I feel bound, therefore, to explain the particular matters which have most affected my mind.

LORD SHAW OF DUNFERMLINE. My Lords, the order of the Court of Appeal in Ireland affirmed the judgment of Ross J., sitting for the Master of the Rolls in Ireland. That judgment declared that the respondents were entitled to the exclusive right of fishing for eels and to all eel fishing places and weirs in Lough Neagh, and it adjudged that they be quieted in the possession of these exclusive rights. So far the judgment was applicable to the lough as a whole. The injunction directed against the appellants to restrain them from eel fishing or interference with the respondents' exclusive rights before declared was, however, geographically limited to a portion of the lough known as Toome Bay, lying to the north of a certain line specified in Ross J.'s judgment. So far as the questions of law to be determined in this case are concerned, this limitation, which was accompanied by liberty to make further application, need not be further considered. Be the judgment for one party or the other, it falls to be based upon the opinion held with regard to the rights of parties to the lough as a whole.

In the next place, my Lords, those rights so considered extend to all fishings whatsoever, including not eels alone, but salmon, trout, pollen, and other fish. The case of both parties was presented, and rightly so, at your Lordships' Bar.

The claim, accordingly, is of an extensive character, extending as it does to all the fishings in the largest inland lake in the United Kingdom, a sheet of water over 100,000 acres in extent. This great lough, of about twenty miles in length by fifteen miles in breadth, is fed by thirteen rivers. It is bounded by five counties and is navigable throughout. It, however, is not a

tidal lough, its waters outflowing by a comparatively short stretch of the river called the Lower Bann into the sea. "Steamers, as well as other vessels carrying passengers and merchandize use it as a highway from place to place on its shores."

Having carefully considered the evidence, and reserving for the moment his denomination of the trade or practice of fishing as a public right, I am of opinion that the affidavit of John Devlin in the following terms is substantially in accordance with the facts: "The number of fishermen exercising their calling on Lough Neagh is about eight hundred, and the number of people depending for their livelihood on this public right of fishing therein is over three thousand. In nearly every case these fishermen represent a line of families who, from generation to generation, have followed the occupation of fishermen, publicly fishing and earning their livelihood upon Lough Neagh."

As bearing, however, upon the gravity of the issue to be determined, I may add this consideration: To the best of my humble judgment, the progress of titles founded on by the respondents appears to embrace, in all its salient items, not the fisheries merely, but the lough itself, extending to 150 square miles or thereabouts, and the soil thereof. It is accordingly manifest that the scope of the title submitted to the judgment of this House is such that it would embrace lough, soil, and fisheries so completely as not only to exclude the public, and, if desired, to put a stop to the immemorial usage of fishing referred to, but to exclude also all riparian owners round the entire extent of Lough Neagh, and inhibit these owners from the exercise of fishing or of any patrimonial rights ex adverso of their properties. These owners are not called as such in this action, and I do not suppose that the judgment about to be pronounced by your Lordships would be binding upon them. But the title submitted is as I have stated, and the importance of the issues to be here determined is added to by the consideration that the title falling to be interpreted on the lines of the argument submitted for the respondents would appear to involve a territorial claim of stupendous magnitude.

The plaintiffs are lessees of Lord Shaftesbury under a lease dated July 18, 1905, which demises the eel fisheries in Lough

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Neagh and the river Bann for 5000 years at a rent of 884*l.* The Earl covenants for quiet enjoyment by the lessees "so far only as relates to his own acts and defaults." The statement of claim made in this suit by the lessees is, I observe, dated February 16, 1907, and upon that day a lease was granted of the right to fish for salmon, trout, pollen, and other scale fish in a part of Lough Neagh. The details as to these leases and subleases need not be entered upon. The title actually put in issue is Lord Shaftesbury's title, he being the successor of the Earls of Chichester and Donegall. My Lords, the steps of Lord Shaftesbury's title have been examined, if I may say so, with such fulness and clearness by the Lord Chancellor that I do not think that it is necessary for me to do more than tender my respectful assent to his analysis thereof and conclusion thereon; and I only venture to add to the narrative to the following limited extent.

I think, my Lords, that the respondents accurately put the issue in the first statement of their claim, and it will be observed that they put it in all its breadth. "At and previously," they say, "to the granting of the letters patent next hereinafter mentioned, King Charles II. was seised in his demesne in fee simple in possession of all the fisheries of what kind soever of and in the pool of Lough Neagh . . . . situate in the counties of Down, Tyrone, Armagh, Antrim, and Londonderry; and the river Bann, and also all the islands in the said lough and the bed and soil of the said lough." They then proceed to cite the letters patent of 1661, which were the subject of examination in the case of *Bristow* v. *Cormican*. (1) Certain deeds and documents not produced in that case have now been furnished. The most important of these is undoubtedly an inquisition of July 12, 1605, because it purports to carry the record of title back to the reign of Queen Elizabeth. It humbly appears to me, my Lords, to be a serious blot upon the title so traced, that it starts with a finding that Queen Elizabeth was seised in her demesne as of fee in right of her Crown in England in all manner of fisheries, "in and upon all that moiety of the pool of Lough Neagh aforesaid which lies towards the east parcel of Clandeboye aforesaid in the county aforesaid." My Lords, I

(1) I. R. 10 C. L. 398.

have no doubt, notwithstanding the observations as to the term "medietas" made in his judgment by the learned Lord Justice FitzGibbon, that this was not a title to the fisheries over the whole of Lough Neagh.

In the next place, my Lords, notwithstanding repeated consideration of the case, I have still serious doubts as to what is the meaning of the term "seised in her demesne and as of fee in right of her Crown of England." I think it necessary to explain how this strikes me. I agree with Ross J. when he declares broadly, "There is no record in evidence to enable us to know in what way the whole lough became the possession of the Crown," and I think the occasion for explanation all the greater because the same inquisition, namely, that of July 12, 1605, taken at Antrim, contained striking internal evidence as to the kind of thing which was meant at that period of the history of Ireland by the expression "in right of her Crown of England." The jurors, having affirmed that Queen Elizabeth was seised in her demesne as of fee in right of her Crown of England of the moiety of the pool of Lough Neagh, as stated, proceeded to say that the Queen, being so seised, entered into a certain indenture with Sir Thomas Smith and his son, dated October 5, 1571, and the indenture is printed ad longum among the papers. The indenture narrates as follows: "Whereas there had been in Her Highnesse Earldoms of Ulster in Her Highnesse Realme of Ireland divers ptes and pcel that liethe wast or els being inhabited with wicked, barbarous and uncivile people, some Skottish and some wild Irish, such as latlie weare rebellios to Her Highness and commonly are out of all good order and as yet weare in continueall rebellion, Her Matie, considering how great a benefit that should be to Her Realme and to the honnor and comoditie of Her Matie, her Heires and Successors, to have the same peopled with good and obedient vassals whoe should acknowledge the great benefits of all Her Highnesse Royal authoritie and be a force at all times to aid Her Matie, her deputie, or other officers, to repress all rebellios and sedicious people and be an occasion by their example to bring their Rude and Barbarous Nacon of the wild Irish to more civilitie of manners."

It then proceeds to narrate how Sir Thomas Smith and his

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son had made suit to the Queen to accept their offer of service to subdue, "represse, expell, or bring into her Matie's mercy all rebels," and to plant in those places true and faithful subjects. The return for this was that the said lands and countries were to be divided, one footman getting one ploughland, and one horseman getting two ploughlands, each ploughland to contain six score acres of arable land, and to have in readiness to serve in defence, at the inhabitants' costs and charges, so many men. They also bargained, among other things, that they would not give or convey any of the lands "in the said realme of Ireland, otherwise than under like conditions of not marrying themselves, their heires or assigns, with any such of meere Irish bludds or Skottish Irish." In return for all this the Queen covenanted to give and grant "as much as in Hir is" certain manors, lordships, fishings, &c., "with all other hereditaments whatsoever to our said Soveraigne Lady the Queen, by inheritance, attainders, Acts of Parliament, or by any other meanes belonging or appertaining unto hir, or that of right ought to come belong or apptain unto Her Matie." Now, all euphemisms as to civility of manners and the like being done with, the curious but, after all, the really substantial covenant follows, namely, to grant "as much as in Hir is" to Thomas Smith the son all other manors, lordships, &c., "with all other hereditaments in the said earldome of Ulster as the said Sir Thomas Smith or Thomas Smith his sonne, their heires or assignes, shall at any time before" March 28, 1579, "happen to recover, obtain or win upon the wild Irish and inhabitants as aforesaid." And the concluding covenant promises to grant letters patent and commission "to the said Thomas Smith the son to invade the said countries with armis, power and force of men." Possibly enough, this task and enterprise were too onerous. And it turned out, my Lords, that by March 28, 1579, as the inquisition relates, neither Sir Thomas Smith nor his son "obtained, recovered, or divided all and singular the premises or any parcel thereof."

In short, my Lords, the deed is not a derivation or transfer of title by law; it is a commission; and that commission was simply a commission of conquest, and it failed. But it will be

observed that, so far as an assertion of property in a patrimonial sense is concerned, Queen Elizabeth's grant is carefully guarded by phrases such as "inasmuch as in Hir is," or, in another passage, "appertaining unto Hir, or that of right ought to come, belong, or appertain unto Hir Majesty." There is, as I say, no tracing of title, and, in short, I do not entertain much doubt that the only title put forward was her right to the Crown of England. This view is confirmed by the further step bringing, or being supposed to bring, the property into the hands of King James. For the inquisition in its final step proceeds: "And the Jurors likewise say that . . . . all and singular the premises . . . . belong and appertain to our said Lord James the King that now is, as well in right of his Crown of England as by reason of the force and intention of divers Statutes in that behalf made, ordained, and established." There have been no statutes cited to confirm such a forfeiture, annexation, or possession of property. So that the title of King James appears again to arise solely jure coronæ. My Lords, this assertion of title is explained historically by the spirit of the time; it was a rough and ready claim of right by the power of the sword. But we are, here and now, in the region of law; and it is unquestionable that a claim thus rested on the mere right of the Crown is without legal foundation.

My Lords, the stage of the inquiry now reached is that of the examination of this title as a bare paper title. Totally different considerations come into play when a long-continued possession has followed. The case being considered is that of the bed, soil, and waters of a great inland lake. Jure coronæ, these do not belong to the Sovereign of the realm. In the words of Lord Cairns in *Bristow* v. *Cormican* (1), "The Crown has no de jure right to soil or fisheries of a lough like Lough Neagh . . . . I am not aware of any rule which would, prima facie, connect the soil or fishings with the Crown, or disconnect them from the private ownership either of riparian proprietors or other persons. Charles II., or some of his predecessors, may have become possessed of the lough and its fishings, either by grant or forfeiture or otherwise; but it would be a legitimate and

(1) 3 App. Cas. 641, 652.

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necessary subject of inquiry, how, and from whom, and subject to what conditions or qualifications, this possession or proprietorship was obtained."

My Lords, it is in that view that I reckon the production of this earlier inquisition, that is to say, proceedings which were not before this House in the case of *Bristow* v. *Cormican* (1), but are now before your Lordships, to be of importance. For it now appears that, instead of there being anything to connect the soil or fishings with the Crown, or disconnect them from the private ownership of subjects,—that is to say, to connect or disconnect hese according to law—there is much in gremio of these documents to suggest that, instead of a legal process, whether of private or statutory transfer, there was what in the eye of the law, when it is settling patrimonial rights, must be considered to be simply a usurpation.

I need not carry it further than to say that I think that no title which, apart from possession, could now claim to stand valid in law is proved in the person either of Queen Elizabeth or of any of the Sovereigns of the Stuart dynasty. And I think it fairly manifest that, in the opinion of the advisers of the Crown, the Sovereign's title was, to say the least, considered doubtful. This last consideration is confirmed by the review of the various transfers and grants, and the repugnancies and confusions arising therein, made in the judgment of my noble and learned friend on the woolsack. One document of the series is plain enough, as it is not unnatural to expect, remembering the grantor and the time; I refer to the lease granted by Oliver in 1656. That deed quite openly and bluntly defies all the formalities relating to the grant of Crown properties, and it is frankly founded upon nothing but the will of the Protector. But I think that the maxim "Stat pro ratione voluntas" can also be discerned equally as alone lying at the foundations in title of all the Royal grants. To regularize these either constitutionally or legally a statute was required; and there appears to be no such statute.

My Lords, there is another view of this matter upon which, although I view it with interest, I should have desired further

(1) 3 App. Cas. 641.

argument before making any pronouncement. I refer to the following point: Had Lough Neagh been tidal as well as navigable, there could be no doubt of the law that, in the first place, it could have belonged to the Crown jure coronæ, but that, so belonging, it would have been subject to public rights of fishing, that is to say, rights in the public as such. Lord Hale, De Jure Maris, is naturally cited in this connection, and Lord Blackburn, in *Goodman* v. *Saltash Corporation* (1), puts the familiar point thus: "The right of fishing in arms and creeks of the sea and in tidal rivers is originally lodged in the King, yet, as Lord Hale says, 'The common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places, creeks or navigable rivers, where either the King or some subject has gained a propriety exclusive of that liberty.'"

In the argument it was suggested that this great inland lake, or inland sea, might well be treated as subject to a public right of fishing, because, in any view, the best that could be said for the Crown's right was that it must have been acquired as part of a great act of State. That being so, it is not at all beyond the range of forcible argument to maintain that Crown property in an inland sea shall be subject to the same limitations of public use as those affecting open tidal water. There may be much in the history of Ireland from the period of the overthrow of Shane O'Neill to confirm the view that the transition then made from what was practically a tribal to what was practically a feudal system should be accompanied by the conservation of those public rights in those waters which, be they the great lake or the foreshore, or arms of the sea, form both a highway and a source of sustenance for the people of the country.

My Lords, I do not pursue the topic further, holding, as I do, that the original title of the Crown is defective. But my desire is to indicate that, had the Crown right as such been held to be valid, even though the validation had taken place by formal act of State, the question as to the existence of public rights in water thus taken over by the Crown might still have remained for

(1) 7 App. Cas. 633, 651.

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serious consideration. In short, in the language of Lord Cairns, "it would be a legitimate and necessary subject of inquiry . . . . subject to what conditions or qualifications this possession or proprietorship was obtained." In such an inquiry I do but desire to indicate that one of these conditions, or qualifications, might be the existence of a public right over this Crown property, even although it was inland water.

It will be observed, my Lords, that the conclusion to which I have felt constrained to arrive is that the title of the Crown, whether in 1605 or onward throughout the seventeenth century to 1661, the date of the documents of which so much citation has been given, is not proved. I think it would have been possible to found upon it, with all the doubts attaching to it, as the beginning of a title upon which possession could proceed. On the subject of possession I have not, since reperusing the evidence and papers, entertained any doubt that the possession was not exclusive. The public have fished, and fished as of right, and fished all the time.

In the next place, the entries of any payment made in respect of the fishings of Lough Neagh are discontinuous by centuries or half-centuries. They are nearly always mixed up with the possession, not of the lough alone, but of the river Bann and the lough. It appears to me to be quite impossible to hold that anything like possession of Lough Neagh as a several fishery is proved. On that part of the case I refer to and adopt the opinion, which I have had the advantage of seeing, of my noble and learned friend Lord Robson.

I desire, my Lords, to make special reference to one point upon possession, to which great importance was attached in the opinions of the learned judges who decided the case of *Bristow* v. *Cormican* (1), and especially in the opinions of Lord Cairns and Lord Hatherley. Ancient leases go in the direction of proving that the subject of the lease was believed to be the property of the grantor. He not only presumably believed himself to be and actually held himself out as owner, but the demise was accepted upon the footing that he was. Now the possession, per the leases of Lough Neagh, and the fishings

(1) 3 App. Cas. 641.

therein, was, in *Bristow's Case* (1), made the subject of careful scrutiny. Lord Cairns went over the documents then before the House seriatim, and observed that "from 1660 to 1811 there is a complete blank as regards anything that would be evidence of ownership or seisin in 1660."

My Lords, as prefatory to the observations which I shall venture to make on the lease of 1803, I think it right to state the seriousness of the issue on this subject in Lord Cairns's own language: "In 1811 there is a lease by the then Marquis of Donegall to Sir George Hill of fishings in Lough Neagh, for sixty-one years, expiring in 1872, at a rent of 60*l*. But the extent of the fishings included in this lease does not appear to me to be necessarily co-extensive with the whole of the lake. On the contrary, the lease appears on the face of it to raise a question as to the extent of the fishings intended to be demised, which could be solved only by parol evidence. The description of the fishings demised is this, 'All that and those the salmon, trout, pulling, and scale fishings of Lough Neagh . . . . in as full, ample, and extensive a manner as the same have heretofore been enjoyed by the Marquis of Donegall, and those under whom he has derived . . . . with full power of going to the banks of the said lough and river, and every part thereof within the aforesaid limits . . . . for the purpose of catching and taking salmon and other fish, except eels, within the known and accustomed limits of said fisheries, as late in the tenure of the Rev. Edward May, by virtue of an indenture of lease dated the 1st day of October, 1803' . . . . which lease had come by assignment to Sir George Hill, and had been surrendered." Lord Cairns then proceeds: "It is impossible not to see that this lease is not meant to be a demise without qualification of the fisheries of the whole lake, and that parol evidence of the 'known and accustomed' limits of the fisheries as then lately held by the Rev. Edward May might have been introduced, and might have been material." Lord Hatherley deals with the same topic in this language: "And when you come to the lease to Sir George Hill, you find that it is founded upon a grant which had already been made to the Rev. Edward May by a demise of 1803, and the grant is to

(1) 3 App. Cas. 641.

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hold in the same manner, and to the same extent, in fact, as May had held. That made it particularly important that we should see the lease to May. That lease to May, or the counterpart of it, must be amongst the archives of the Donegall family, by whom this lease was made; but that document has not been produced."

My Lords, in the proceedings in the Court in Ireland and in this House in the present case the lease to Edward May of October 1, 1803, was produced. In view of the language of these great judges, which I have just cited, I do not feel myself free to disregard or to attach anything but a high value and significance to May's lease. Indeed, I have thought it right, personally and carefully, to examine that parchment document and I will now state the result of that examination. It is docketed thus: "A memorial of the within deed was entered in the Registry Office in the city of Dublin the 30th day of August, 1805, at half an hour after 11 o'clock in book 572, page 145, No. 386,629, and the execution of the said deed and memorial was duly proved pursuant to an Act of Parliament in that case made and provided." My Lords, that memorial is also produced. It bears to be a memorial of the indenture of October 1, 1803, between the Marquis of Donegall and Edward May to the effect that the Marquis "did demise and set unto the said Edward May, his executors, administrators, and assigns, all that the salmon fishery and soil of the river Bann, with full right and liberty of taking and carrying away and exporting of salmon fish," and with full power "of going to the bank of the said river and every part thereof," and of laying nets thereon. It is plain, my Lords, that the memorial bears to have nothing to do with Lough Neagh, and it would seem to be quite as plain that the deed of which it is a memorial had nothing to do with Lough Neagh.

I now proceed to see what is the demise in the parchment lease of October 1, 1803, itself. It is not a demise of "the salmon fishery and soil of the river Bann," as the memorial bears it to have been. I am humbly of opinion that it was so originally; but erasures have been made upon the parchment, and the space upon erasure is thus filled up. The words now appearing are "the salmon, trout, and scale fisheries of Lough

Neagh and the river Bann," instead of, as I have said, the "salmon fishery and soil of the river Bann." A few words further on in the parchment, "the liberty of taking and carrying away and exporting of salmon fish" contains the erasure of the word "salmon" and the writing in of the word "such." This squares with the writing over the first erasure before mentioned. And, my Lords, when the power and liberty of going to the banks is mentioned, whereas in the memorial the lease was said to have contained a power and liberty of going to the bank of the said river, erasures again occur, and instead of "said river" it is "said lough and river." Other changes, by interlineation and upon erasure, also occur—all of them of such a kind as to transform the text of the deed from what it manifestly had originally been as stated in the memorial into a new and vastly greater grant. Not one of these alterations is authenticated.

My Lords, I have very anxiously indeed considered these revelations, and I am bound to say quite plainly that the description of the property which is the subject of demise and liberty contained in the parchment deed produced and founded on is, to the best of my judgment, a forged description. With some experience of scrutinizing documents and calligraphy, I do not feel myself able to affirm the identity of the handwriting of the alterations with that of the text. Whether there was this identity or not, the changes made were not, in my opinion, mere slips or blunders; this would be so curious as to be almost incredible, and the slips or blunders have manifestly stupendous significance. I cannot hold that such a deed can "make faith in judgment." The effect of the alterations is to include within the subjects of demise general fishing rights in a lough of 100,000 acres in extent, in addition to what was the real and only subject of demise, namely, the salmon fishery in the river Bann.

My humble opinion is that the lease of 1803 was a lease of the river alone. Whether Lord Cairns and Lord Hatherley, observing the reference in the lease of 1811 to the limitation of the subject "as late in the tenure of the Rev. Edward May," and noting the fact that "the grant is to hold in the same manner, and to the same extent, in fact, as May had held," and

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the importance accordingly of the deed of 1803 and the striking fact of its absence, may have had certain surmises upon the subject one does not know. But the desired production has now been made. And the revelation appears to be that, while the deed of 1811 is founded upon a grant made to May in 1803, it now appears, and the deed in its mutilated condition, I think, demonstrates, that May held no portion of Lough Neagh whatever.

My Lords, the link supposed to be missing in the history of the possession by the Marquis of Donegall of the fishings of Lough Neagh turns out to be not a link establishing such possession, but, on the contrary, invalidating the whole of the references in subsequent leases to Lough Neagh as in May's possession, and proving that May's possession had no application under the deed of October, 1803, which referred to other fishings, or part of the fishings, as to which there is no dispute or adverse claim, namely, the fishings in the river alone. It follows, my Lords, that the reasoning of these most distinguished judges to whom I have referred applies a fortiori to the history under possessory title as that history is now disclosed. In my view the fabric of possession thus set up cannot stand. The leases of the last few years, to which I referred in the earlier portion of my observations, thus appear to me to have proceeded from an owner whose paper title is imperfect and doubtful, and has not been validated by clear, exclusive, or continuous possession. The public, thus in enjoyment for generations of the right of fishing over Lough Neagh, are therefore not in a position to be disturbed by the respondents or those through whom they claim.

I should add in conclusion that (1.) possession of the river fishing does not appear to me to throw real light on the ownership of the lough. I think that this is so in the nature of the case, there being no necessary or actual unity of subject such as to ascribe the possession of one in point of fact to both in point of law. There is no such unity, but, on the contrary, and very frequently, great segregation of ownership and possession in regard to salmon fishings stretching from the spawning grounds to the sea; and I cannot see any reason in law for ascribing a necessary unity of ownership or possession in the case of eel

fishings from the fattening grounds to the sea. Further, the instance of Feumore, a portion of the shore of Lough Neagh, and the illustrations given by the learned judges in *Bristow* v. *Cormican* (1) with regard to the difficulty of treating possession at one portion of the shore as equivalent to possession of the entire lough, humbly appear to me to make the present case a stronger instance for the avoidance of the unification of subject claimed. Secondly, I recognize that the licensing of nets of a particular mesh in recent years, and the localizing of their operations at certain seasons, so as to secure in the lough, instead of the river, large takes of outgoing eels, may involve inconvenience and change and loss. These things will be the subject of local or parliamentary regulation, to which the authorities on the spot will, no doubt, direct their attention, so that a remedy, if such is needed, and to the extent which is just, may be provided, and, among other things, undue injury of the fishing avoided.

I humbly concur in the course proposed from the woolsack.

LORD ROBSON. My Lords, although the claim of the respondents is, in form, confined to eel fishing in Lough Neagh, it is founded on documents and allegations of exclusive possession which comprise all kinds of fishing in the lough, together with fishing rights in the river Bann. This has opened out a wide field of controversy, but the questions of law that have been raised are easily disposed of, so far as they are material, when once a decision is reached on the question, whether the plaintiffs have, under the title they put forward, had effective or exclusive possession of the several fishery they claim in Lough Neagh. Once this is established, inquiry into their title, depending on ancient documents, inquisitions, and transactions two or three centuries ago, becomes of comparatively little importance. The law will assume that their possession had a lawful origin and will not impeach their title because, after so great a lapse of time, explicit proof of every document or step necessary to the completion of that title is not forthcoming. On the other hand, if no such possession is shewn, then not only must the paper title be carefully scrutinized, but it may be found perfect in itself and

(1) I. R. 10 C. L. 398.

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yet held unavailing if adequate evidence be given of acts of ownership or user by others inconsistent with it.

There is no question as to the plaintiffs' title to the fishing in the river Bann, but the letters patent which granted the fishery in the Bann granted also the fishery in the lough, and the plaintiffs contend that, apart from the fact of the two places being comprised in one grant, the nature and circumstances of the fishery itself shew that, though specified as being in two places, it is really unum quid. Proof of possession of the river fishery is, therefore, according to them, proof of possession of the lough fishery. I can see no reasonable ground for this contention. It is true that when the eels have fattened in the lough they proceed seaward through the Lower Bann and they must pass the plaintiffs' weir. The weir is, therefore, the most convenient and profitable place for catching them, but that circumstance is far from justifying the plaintiffs in treating the lough and river as one fishery, so that taking possession of any part would prove possession of the whole.

In *Jones* v. *Williams* (1) Parke B. said, in reference to this point, that evidence might be given of acts done on other parts of the property than the part immediately in dispute, if there was between those parts such a common character of locality as would raise a reasonable inference in the minds of the jury that the part in dispute belonged to the plaintiff if the other part did. The fact that the fish caught at the weir all come from the lough does not establish a common character of locality in this sense. No one would infer as a matter of necessity or probability that the man who owned the weir owned the fishery in the lough. Nor is any such "common character of locality" established by comprising both places in the same grant. There is, moreover, the plain fact that until the time of the present dispute the plaintiffs, in letting the eel fishery in the river Bann, have never assumed to let with it the eel fishery in the lough, nor have their lessees ever attempted to proceed on the theory they now put forward that the fishing in the lough was in any sense appurtenant to, or part of, a single undivided fishery inclusive both of lough and river.

(1) (1837) 2 M. & W. 326.

Dealing therefore with the lough fishery by itself, we find certain salient and undisputed facts which are of vital importance in determining the question of possession.

The first is that for centuries, during the time that the plaintiffs' alleged title to the lough fishing has been in existence, the fishing, at all events for eels and pollen, has been a great local industry publicly carried on without hindrance from the plaintiffs' predecessors, and without any attempt on their part to exact any payment or acknowledgment in respect of a practice so inconsistent with their alleged right. It is in evidence that some 3000 people, comprising about 800 fishermen, in the adjoining counties are dependent on this lough fishery. The plaintiffs suggest that this immemorial user, on this extensive scale, has been allowed by the mere good nature of their predecessors in title, and ought to be regarded as being of no more importance in its effect on the plaintiffs' claim to exclusive possession than the picking of wild fruits in a field would have on the landlord's title to the land. I confess myself unable to appreciate that analogy. The extensive industry which is thus compared with a mere practice of petty trespass was the subject of several statutes specifically relating to Lough Neagh whereby it was recognized and regulated. The times and seasons for fishing were restricted; the size of mesh for netting was prescribed; the use of dynamite was forbidden, and other rules were made which shew that the Legislature, at all events, did not regard the public user of the lough fishery as either unlawful or trivial.

It is, however, said that this public fishing used of old to be by line only, and did no harm to the really important fishing at the weir in the river Bann, whereas recently the local fishermen had taken to the use of draft nets which had compelled the owners of the several fishery to withdraw their ancient indulgence. The argument of the plaintiffs' counsel proceeded persistently on the assumption that this contention was established in fact, but the evidence is almost entirely the other way. A great number of local witnesses speak to the use of draft nets long before the present proceedings, going back as far as fifty or sixty years. Some restrictions were for a time placed on that method of

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fishing by the action of the conservators, but the great body of the evidence, to the effect that it existed and was exercised without interruption on the part of the plaintiffs or their predecessors, is almost uncontradicted except as to recent times and in regard to the close neighbourhood of the Bann fishery.

Next, it is admitted by the plaintiffs that, although the lough fishing had been included in certain leases granted by their predecessors in title, there was no evidence that the rights purporting to be conferred by such leases had been actually exercised in the lough as well as in the river. This is an important circumstance in estimating the weight that should attach to such leases as being in themselves proof of possession.

It is also material to observe that, although an owner of a several fishery in Ireland is liable to pay rates in respect thereof under various statutes, no such rates have ever been paid by the plaintiffs, or their predecessors, for the fishing in the lough.

Before examining the evidence put forward by the plaintiffs as to possession, upon which the case must ultimately turn, it is convenient to consider first the nature of their paper title, for the character of that title materially helps us to an understanding of some of the disputed facts with regard to possession.

It is founded on certain letters patent issued by Charles II., and dated July 3, 1661, whereby that Sovereign purported to grant and confirm to the then Lord Donegall, from whom the plaintiffs derive their title, all the fishings and fishing places in Lough Neagh and the river Bann, and also the islands in the lough and the soil of the said lough and of the river Bann to a certain salmon leap; the fishery thus granted being in the five counties therein mentioned. Full power to come to the banks of the lough and use them for their nets and all other things necessary to the enjoyment was also conferred on the grantees. This grant was stated to be in as full and ample manner and form as the said premises were granted by King James to Lord Donegall's relative and predecessor in title, Lord Chichester, by letters patent in 1621.

Such letters patent are, of course, by no means uncommon as the origin of perfectly good titles. In Ireland most of them have been expressly validated by Parliament in various statutes,

or, where not so validated, have become effective and unquestionable by virtue of possession.

Where they are neither confirmed by statute nor made good by possession, no one would contend that the letters patent issued at this period of English history are always to be taken without question at their face value. The documents in this very case suffice to shew how common it was in those times for Royal letters patent to be obtained in complete disregard of the conditions under which alone they could be made effective in law to give a good title to land. That was clearly the view acted upon by your Lordships' House in the case of *Bristow* v. *Cormican*. (1) Then, as now, the title of these very plaintiffs in relation to the fishing in Lough Neagh was the subject of controversy, and, although the decision in the case dealt only with the question as to whether or not the evidence should have been submitted to the jury, the carefully considered opinions of the very distinguished judges who were then dealing with the same subject-matter as is now before your Lordships are entitled to the greatest respect. Lord Blackburn said there was no authority to shew that the Crown is of common right entitled to land covered by water when the water is not running but still water forming a lake. Acting on that view of the law, which has not been disputed here, Lord Cairns thought "it was incumbent on the appellants, in order to make available their documentary title, to give some evidence of the ownership or possession of the Crown at the beginning of that title"; and Lord Hatherley said it was "of very great importance to see how it was that the property became vested in the Crown."

Of course, it must be understood that their Lordships used this language only in reference to the plaintiffs' title as a documentary title. As I have pointed out, proof of actual possession would, under our law, practically supersede all such inquiries, and it is only if such proof is shewn to be wanting that a perfect documentary title becomes essential in this case.

When the plaintiffs' predecessors had been remitted to a jury under the decision of your Lordships' House in *Bristow* v. *Cormican* (1), they proceeded no further with their action; but

(1) 3 App. Cas. 641.

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they contend now that in this action they have complied with the requirements suggested by Lord Cairns and Lord Hatherley as necessary for the completion of their paper title. Have they done so?

From the letters patent of 1661 the plaintiffs now go back to the letters patent granted in 1605 to James Hamilton.

Under the statute 18 Hen. 6, c. 6, "No lands shall be granted by letters patent until the King's title be found by inquisition." These letters patent to Hamilton were preceded by an inquisition a few months earlier, in which it was found that the Crown was seised of the fishing in that moiety of Lough Neagh which lies towards the east in the county of Antrim, and in the river Bann. No commission for the holding of this inquisition is forthcoming. A scrap of paper containing a few illegible words was attached to the return of the inquisition, and the plaintiffs say that it was probably a commission; but it cannot be contended that any Court of justice could accept it as such.

There may or may not be inquisitions dealing with the remainder of Lough Neagh at that time, but they are not produced or proved. Notwithstanding this, the letters patent to James Hamilton deal with the whole of the lough.

Afterwards, on April 10, 1606, Hamilton conveyed his rights under the letters patent to Lord Chichester, who was the ancestor of Lord Donegall. Next, on July 4, 1608, comes another grant of letters patent of the same fishery to one Bassett, in trust for Lord Chichester. It would appear, therefore, that Lord Chichester did not place implicit reliance upon the early letters patent of 1605; and he was probably well justified in his distrust, for on March 29, 1613, James I. issued letters patent in favour of the "Governors and Assistants of London of the new plantation in Ulster within our kingdom of Ireland," of the fishing in the river Bann from the high sea to Lough Neagh, except the fishery which belonged to the Bishop of Derry in that river.

It is undisputed that these letters patent covered part of the fishery comprised in the letters patent then held by Lord Chichester, and the grant to the London Company illustrates the freedom with which, as I have before observed, letters patent

were issued at that time in regard to property the King had already given away or had never possessed. Lord Chichester obtained another grant of letters patent in respect of the same fishery on November 20, 1621, founded on an inquisition at Carrickfergus in the preceding April.

This inquisition recites the letters patent of 1605 and the subsequent dealings with the property so far as Lord Chichester was concerned. It then founds the title of Lord Chichester expressly and wholly on the documents before mentioned, but it does not, any more than do those documents, say a word as to the origin of the King's title on which all depended. It therefore leaves us still in the dark on the point where light was essential, then as now, for the completion of their paper title.

How doubtful the parties were about these repeated grants of the King is shewn still more strongly by what followed.

On July 1, 1640, the then Lord Chichester surrendered to the King considerable properties, including that comprised in the preceding letters patent. The reason for the surrender is therein alleged to be that Lord Chichester should have a good and sufficient estate granted to him as agreed in what is described as an "order of composition" dated September 19, 1639.

Next comes a lease of the fishing in Lough Neagh and the river Bann, dated August 14, 1656, by the Lord Protector to Sir John Clotworthy; and this is followed on November 15, 1660, by a lease from Charles II. to Clotworthy of the same premises for ninety-nine years at a rental of 5*l.* for seven years, rising to 35*l.* a year, for the fishing in both lough and river. This lease contains a non obstante clause providing that "the grant should be valid notwithstanding the not finding or not returning of any office or inquisition of the premises or of any part or parcel thereof and notwithstanding the statute of 18 Henry VI., chapter 6," and other parliamentary enactments to the same effect. Of course this lease from the Crown would be wholly indefensible if the antecedent letters patent were good or if the alleged reason for Lord Chichester's surrender were true.

Having thus indicated his view of the force of the preceding Royal letters patent, and also of whatever value might attach to the alleged purposes of Lord Chichester's surrender, the King

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in 1661 proceeded to make a grant by letters patent to Lord Chichester (who had then become Lord Donegall) of the reversion to the said fisheries, subject to the lease of Sir John Clotworthy (afterwards Lord Massareene). In these letters patent a different purpose is ascribed to Lord Chichester's surrender of 1639 than that before stated. It is said in the letters patent to have been carried out in order "to comply with the late King's occasions." Their Lordships, in dealing with *Bristow* v. *Cormican* (1), pointed out this contradiction, and the doubt thus cast upon the surrender and the documents founded on it. The matter is still left with no intelligible explanation.

Sir John Clotworthy made one payment of his rent before getting his lease and one afterwards. By the letters patent of July 3, 1661, the right to receive the rent is given to Lord Donegall; but the Donegall rent books have been produced, and it must be taken that no rent was ever paid by Clotworthy or anybody else under that lease subsequent to 1661.

Under these circumstances, it is clear that the parties concerned were, to say the least of it, in doubt as to the legal sufficiency or finality of the various grants and letters patent from the Crown. They are repeated in regard to the same property, sometimes to the same person, and sometimes, as in the case of the London Companies and Clotworthy, to different persons, in a way that does not strengthen any presumption in their favour. The non obstante clause in the Crown lease to Clotworthy goes far to explain the want of confidence felt in them. One of the learned judges in the Court below declined to attach much importance to this clause because it occurred so often in letters patent as to be almost a common form; but the fact that it was so often attempted, illegally, to dispense with proof of the validity of letters patent is only an additional reason for not presuming their validity without proof.

After the surrender by Lord Chichester in 1640, the plaintiffs must rely on the letters patent of July 3, 1661, as being the origin of their present title. These letters patent purport to have been granted absolutely on the advice of certain distinguished persons, and without any fresh inquisition or office

(1) 3 App. Cas. 641.

found. The plaintiffs have therefore failed, as their predecessors did in *Bristow* v. *Cormican* (1), to trace the title of the King to any lawful origin, and have not done what Lord Hatherley and Lord Cairns regarded as incumbent upon them, under the circumstances of this particular case. They have only transferred their difficulty from 1661 to 1605. Neither have they shewn that the King's title has been validated by statute. The Irish Act of Settlement enumerated many titles which were thereby made good, but this is not one of them.

These considerations are, as I have said, of little importance if the plaintiffs can shew actual possession, but the uncertainty on the part of the plaintiffs' predecessors as to the sufficiency of their paper title explains a good deal in their case as to possession. They asserted their claim vigorously in regard to the river and weir, which formed a considerable and easy source of profit, but they may well have thought that to assert dominion over the lough would be a more serious and troublesome matter, both as to the proof of title and to the enforcement of a judgment. They ventured so far as to include the lough in a few of their leases, and in a few cases induced fishermen here and there to pay something which may have been for fishing or some special facilities in connection with fishing in the lough. It is clear, however, that they never seriously attempted any occupation of that fishing as a whole. Leases are ordinarily the best proof of possession if it can be shewn, or reasonably presumed, that the lessees exercised the powers contained in them; but in this case they are accompanied by circumstances which greatly diminish their value as evidence of possession so far as the lough is concerned. In the only important cases where the lough fishing is granted, it is accompanied by a grant of the river fishing, and the possession taken and payments made under those grants seem to have been in regard to the river fishing only. Others, relating to the lough alone, were apparently taken for what they were worth, and then abandoned by the parties because the lessor could not, or did not, attempt to give his lessee exclusive possession of the fishery leased. Thus Sir John Clotworthy is not shewn to have asserted any ownership over the fishery in the

(1) 3 App. Cas. 641.

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lough as against the public, and his payments of rent ceased the year after his lease. His lease expired in 1755. Important and profitable leases were then made of the fishery in the Bann, which included the Toome eel fishery as part of the river fishery. They were followed by considerable litigation in regard to the river fishing. The Donegall rent books shew payments of large rents for the river from 1775 to 1816, but nothing is recorded as being done in reference to the lough until the next century, except a small payment of 3*l.* 8*s.* 3*d.* by one Blizzard in 1797, under a lease which seems to have been surrendered in 1798. In November, 1800, a payment is made by Heyland of 7*l.* 10*s.*, and another payment in May, 1807, of the same amount in respect of fishing in the lough. Four payments of 6*l.* each are made by Joseph Macay in 1800 and 1801; Samuel Finiston made a payment of 7*l.* 10*s.* in May, 1801, and another in 1807, which are all expressed as being in respect of the lough fishery. There are also entries shewing payments which appear to be made on dates about that period for boat accommodation or special facilities on the Strand, near Shane's Castle, which indicate that something more than ordinary fishing may have been the origin of these payments.

There are no documents produced which explain these entries. It is certain that the lough was then being fished, as now, by local fishermen on a large scale, so that responsible tenants would scarcely incur a pecuniary liability for a privilege which other people were publicly exercising for nothing. If it is suggested that the payments related only to some special kind of fishing, e.g. salmon, it should be remembered that in 1803 a lease of the salmon and scale fishing for both lough and river is alleged to have been given by Lord Donegall to a clergyman called May for a term of sixty-one years at 60*l.* per annum. That lease covers the period during which some of the above payments were made, and prevents them from being accepted as evidence that the persons who made them did so as tenants or lessees with exclusive possession of any part of the lough fishing.

The lease to May is a most unsatisfactory document. It is the first lease since Clotworthy's lease purporting to deal with the lough as well as the river. The lough is mentioned in the

lease, but not in the memorial thereof which was enrolled, and the words in the lease referring to the lough are written over erasures. It is important to observe that May never paid any rent, and there is nothing to shew that the document was acted on.

On November 1, 1811, May's lease having been assigned to Sir George Hill and surrendered, a fresh lease was granted to Hill of the fisheries "within the accustomed limits of said fisheries as late in the tenure of the Rev. E. May" for sixty-one years at 60*l.* per annum. No rent appears to have been paid by Sir George Hill under this lease until 1843, and the payment was continued to 1847; but as it was under a lease of both lough and river, it is by no means sufficient to shew that actual possession was taken of the fishing in the lough.

On March 29, 1829, Lord Donegall made a long lease of the lough and river fishery to John Wallace, as trustee for Crommelin, for a premium of 600*l.* and a rental of 55*l.* 7*s.* 8*d.* subject to Hill's lease. Hill's assignees made a sub-lease in 1837 to Lord O'Neill of part of the Lough Neagh scale fishery near his residence and in Lough Beg, which was part of the river fishery, at a substantial rent; but, except what I have above mentioned, there is no document dealing separately with the lough fishing, or shewing any payment specifically made in respect of it, until recent times, when the dispute began which has culminated in this action.

In fact the plaintiffs' case for the ownership of the lough depends substantially on evidence as to their possession of the fishing in the river. They have admittedly failed to prove a single act publicly and clearly indicating their claim to exclusive possession of the lough, and the fact that the lough fishing was more or less speculatively comprised in a few leases along with the river fishing is not, under the circumstances of this case, sufficient to make good their claim.

I need not deal in detail with the various prosecutions and suits which have been explained in evidence. Except as to two or three convictions obtained by Lord O'Neill, they all relate to the river, or are of quite recent date leading to the present litigation. Lord O'Neill's prosecutions are more material. They

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were brought in 1862 and 1868 for trespass in the lough near his residence, and are, of course, some evidence in support of the plaintiffs' contention. In dealing with these prosecutions in *Bristow* v. *Cormican* (1) Lord Blackburn suggests that a jury might be right if they inferred that Lord O'Neill took the sub-lease in order that he might protect his own demesne and that the acts of his keepers were novelties. That certainly strikes me as the more probable view, having regard to all the circumstances of this case.

As to the rights conferred by the letters patent to the soil of the lough and the power of using the banks for fishing purposes, the plaintiffs have not attempted to make any case. Yet, if they are right, they have been for centuries, and are now, entitled to powers over the water supply and drainage of the adjacent counties, which may be of great value, and were not likely to have been overlooked if they could have been enforced.

I think, therefore, that the plaintiffs have failed to prove effective possession of the fishing in the lough. As against the ambiguous and uncertain acts on which they rely, we have the open, extensive, and unchallenged user for centuries of that fishing by a fleet of boats and hundreds of fishermen in a way that is gravely inconsistent with the plaintiffs' title.

It is settled law that the public cannot prescribe for a profit à prendre; but because the public user does not avail to establish a public right, it is not, therefore, to be treated as being without significance on the question of ownership. Like every other right or privilege which has been long exercised, the Courts will presume a legal origin for it if they can, and the facts of this case are consistent with, and indeed strongly suggest, a licence tacitly given by riparian proprietors or by other persons whose ancient title has never yet been extinguished by the Crown. Under these circumstances the public user is cogent for the purpose of rebutting a private paper title unsupported by possession, or supported only by such doubtful acts as are here alleged.

In *Blount* v. *Layard* (2) Lord Esher puts the case of a paper

(1) 3 App. Cas. 641, 670.

(2) Reported in note to *Smith* v. *Andrews*, [1891] 2 Ch. 681, n., 684.

title, against which facts (e.g., a long public user) are shewn which make it doubtful whether the holder of the title has the real title, and he says that in such circumstances a jury may say to him: "We come to the conclusion that you did not interfere with these people, because, although you had a paper title, you were afraid to act upon it; because you knew, or because you feared, that, notwithstanding your paper title, some one else had a better title."

In my opinion, such a conclusion would be amply justified in the present case. The plaintiffs have shewn neither effective possession nor a sufficient title, and I think this appeal should be allowed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 14, 1911.

Solicitors: *Herbert Z. Deane, for L. A. Meenan, Belfast; Wansey, Stammers & Co., for French & French, Dublin.*

[HOUSE OF LORDS.] 1st

HARRIS AND ANOTHER . . . . . APPELLANTS;

AND

EARL OF CHESTERFIELD AND ANOTHER . RESPONDENTS.

Fishery—Prescription in a Que Estate—Profit à prendre in alieno solo—Presumption of Legal Origin.

A prescription in a que estate for a profit à prendre in alieno solo without stint and for commercial purposes is unknown to the law.

Freeholders in parishes adjoining the river Wye had been in the habit of fishing a non-tidal portion of the river for centuries, not by stealth or indulgence, but openly, continuously, as of right and without interruption, not merely for sport or pleasure, but commercially, in order to sell the fish and make a living by it. Riparian proprietors claiming to be owners of the bed of the river brought an action of trespass against the freeholders for fishing:—

Held by the Earl of Halsbury and Lords Macnaghten, Gorell, and

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Kinnear, that a legal origin for the right claimed by the freeholders could not be presumed, and that the action lay.

Held by Earl Loreburn L.C. and Lords Ashbourne and Shaw of Dunfermline, that a lawful origin for the exercise of the freeholders' claim ought to be presumed, and that the action did not lie.

Decision of the Court of Appeal, [1908] 2 Ch. 397, affirmed.

The circumstances material to this appeal are stated in the judgment of Earl Loreburn L.C.

March 27, 28, 30, 31. *Micklem, K.C.*, and *Mossop* (*J. Lloyd* and *J. O. Hickman* with them), for the appellants.

Upjohn, K.C., and *Methold* (*Stuart Moore* with them), for the respondents.

The House took time for consideration.

July 14. EARL LOREBURN L.C. My Lords, in this case Lord Chesterfield and Mrs. Foster, the plaintiffs, seek to restrain by injunction certain freeholders in parishes adjoining the river Wye, a few miles below Hereford, from fishing. That the plaintiffs have a title to sue I have no doubt, though it was eagerly disputed; and therein I agree with the Court of Appeal. On the question whether or not the defendants are entitled to fish, which is the real point in this litigation, I have the misfortune to differ from the Court of Appeal, and must state my reasons for the difference.

It has been proved beyond doubt that freeholders within five riparian parishes (a class within which these defendants come) have been in the habit of fishing within the stretch of water from Blackwell's Ditch down to Gorse Acre for centuries, not by stealth or indulgence, but openly, continuously, as of right, and without interruption. In the documents beginning in 1637 this right has been in terms asserted. From the documents anterior to 1637 as far back as 1292 it seems most probable that there was in fact a fishery belonging to freeholders as such in a part of the river Wye, which certainly comprised some miles of the water now claimed, and may well have been coterminous with it. It is true that the right is stated in somewhat different terms in some of the documents, and that some of the witnesses who spoke to

reputation claimed that it belonged to more than the freeholders of the parishes adjoining the river. But these differences of reputation curiously correspond with the contents of ancient documents, as I will presently indicate.

There was in remote times, earlier than Domesday Book, a territory on the bank of the Wye called the Hundred of Irchenfield. It was terra regis, the King's land. Perhaps, indeed probably, it was, or part of it was, a Royal forest, if that signifies. Either then or a little later a manor of Wormelow is found in the same locality. Your Lordships heard much discussion whether Irchenfield and Wormelow were different names for the same district, whether the district was really a hundred or a manor, or both, what were the true boundaries, and whether other manors within the supposed district were sub-manors, and what in turn were their boundaries. I believe it is quite impossible at this day to answer these questions with certainty, except that from the thirteenth century onward the hundred of Irchenfield and the manor of Wormelow were treated as conterminous and comprised a very large area, to this day ascertainable from the Perambulation of 1639, and including the whole of the river Wye from Blackwell's Ditch to Gorse Acre.

The allusions to the fishery, now claimed in this action, vary somewhat in the documents. In one of the earliest of them, Pleas of the Crown of 1292, a fishery is said to exist libera omnibus patriæ ibi volentibus piscare, which means, I think, not the public but the freeholders of the district, patria being used in the narrower sense, as where an accused says he will be tried by his country. In a presentment dated 1637 the right is said to belong to the freeholders of the five parishes within the manor of Wormelow which adjoin the river. In 1822 there is a presentment stating the right to be in the freeholders whose land adjoins the river, the brinkers as they are called. I think with Neville J. that this last presentment was due to an effort by the lord of the manor to procure some limitation of the right. It is quite clear that in fact the 1822 limitation has never been acted upon. How the persons entitled to fish came to be restricted by 1637 to those owning freeholds in the five parishes instead of the larger area called "patria," (if indeed that was a larger area,)

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must be a matter of speculation. It may be that the record of 1292 used too wide language, a likely enough thing in earlier times, or that the right was subsequently restricted in some lawful way now undiscoverable. The latter conjecture seems the more likely, and it corresponds, as I have said, with the reputation proved by witnesses at the trial, some saying that the right is reputed to be in the freeholders of Wormelow, others that it is in the five riparian parishes of Wormelow. It is in precisely such circumstances as these that a Court must turn from the documents and the evidence of reputation to the actual evidence of user. Of that user in the present case there can be no doubt. All the freeholders who pleased in the five parishes adjoining the river have used this right so far back as human memory will go, not merely for sport or pleasure, but commercially, in order to sell it and make a living by it, and in later years to supply the market in Hereford and Birmingham. Others also may have fished. Both the defendants come from riparian parishes, and their right is clear, whoever else may share in it.

It was sought to prove that in this same stretch of water there had been for a long time certain other rights of fishery vested either in riparian owners or in lords of manors. Two of these rights, which seem to have been quite valid, were appurtenant or appendant to mills, and were abolished under an Act of Parliament on payment of compensation many years ago. Mr. Upjohn argued that the existence of these other fishery rights was inconsistent with the claim of the defendants. Assuming that he had made good this title for all of them, it in no way affects the case. There may be concurrent rights over the same water, and it is noteworthy that the presentment in favour of the right of free fishery in 1637 admits the title of others besides the freeholders, saying that the freeholders' fishery in the Wye and Garren is "except in such parts of the said rivers where any of His Majesty's subjects have or ought to have a right of free fishery, either by grant of the said King or any of his ancestors, or by prescription." Other presentments contain a similar exception.

It is not necessary to deal more in detail with the mass of papers which have been laid before us and scrutinized with so

much minuteness. What is being done by these defendants has, I cannot doubt, been done by freeholders in these five parishes for 300, and I believe for upwards of 600, years. It is said that it has been done owing to the indulgence or good nature of landowners on the banks or lords of the manor. All the evidence is that it was done in assertion of a right, and so far as the evidence touches the point, the exercise of this right was distasteful to the riparian proprietors.

Now, my Lords, there can be no question about the view which Courts of law entertain in regard to a claim of this kind. When long and continuous enjoyment is established, a lawful origin will be presumed if it is reasonably possible. This doctrine has been repeatedly affirmed, and in no case better illustrated than in that of *Goodman* v. *Saltash Corporation* (1), so often quoted during the argument. In that case the corporation possessed a several fishery in part of the river Tamar, but the inhabitants of ancient tenements in Saltash had from time immemorial dredged for oysters in the same water during some months in the year. They had no charter or ancient records of title to rely upon, but simply the fact that they had so dredged openly, as of right and without interruption. Upon this the House of Lords held that a lawful origin for the exercise of this right of dredging ought to be presumed, and the House presumed that, in the original grant to the corporation of a several fishery, there must have been a condition or trust in favour of the inhabitants of ancient tenements under which they were authorized to dredge for those months in the year. Lord Blackburn, indeed, dissented; but Lord Cairns, Lord Selborne, Lord Watson, and Lord Bramwell concurred in this decision. There was no evidence whatever of such a condition or trust, and no evidence of the original grant upon which it was supposed to be engrafted, but the decision proceeded upon the doctrine I have stated.

I do not say that we are entitled to presume anything which, upon the facts of the particular case, is impossible, still less that we are entitled to set up a right which the law does not allow. But the principle is surely based upon good sense. The

(1) (1882) 7 App. Cas. 633.

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lapse of time gradually effaces records of past transactions, and it would be intolerable if any body of men should be dispossessed of property which they and their predecessors have enjoyed during all human memory, merely upon the ground that they cannot shew how it was originally acquired. That is the reason why the law infers that the original acquisition was lawful, unless the property claimed is such that no such body of men could lawfully acquire it, or the facts shew that it could not have been acquired in the only ways which the law allows.

Accordingly I come to the crucial inquiry, Is it in reason possible that there may have been a lawful origin for the right here claimed, that is to say, a right in freeholders of the five parishes adjoining the river Wye on its right bank from Blackwell's Ditch as far as Gorse Acre, to fish and sell their catch, by themselves and their domestic servants? That it must be subject to all Acts of Parliament and other valid regulations goes without saying, and is indeed said, if it were needed, in the ancient records of the claim. But can such a thing here have been ever created?

Now it appears to me that this question should be answered in the affirmative. If the King originally owned these waters and the soil over which they flowed, he might lawfully grant to the freeholders of a particular area a fishery in gross. By doing so, if he did so, he made them a corporation, at all events if they rendered any rent or service in return, for the purpose of taking the grant and giving the return. This was not really questioned. Or the King might have made the grant to some existing corporation, such as the men of Irchenfield may have been, upon a condition or trust in favour of the freeholders. Mr. Upjohn's argument on this head was really based upon what he called the absurdity of supposing that there ever could have been such a grant accompanied by a service, when there was no evidence of either the one being made or the other rendered, and the primitive circumstances of the time made it so unlikely.

If there were proof of such a thing having actually been done, there would be no need of a presumption. It is precisely because you cannot prove what happened six or seven hundred years ago

that you infer something now incapable of actual proof, in order to explain a long course of user otherwise unaccountable. I do not know why that which I have described as possible may not have actually happened. It seems to me not improbable that it did happen. To begin with, it is common ground that at one time this hundred, or manor, was terra regis, and most probable that the manor, or hundred, included all the stretch which is now in question. We know that in quite early times the King alienated the riparian land; whether with or without the bed of the river usque ad medium filum is left in doubt by the terms of such of his grants as are extant and have been produced. We know that his grantees, in fact, suffered (and I cannot suppose this was out of mere good nature for so many hundred years) a continuous fishing by the freeholders under claim of right. A legitimate inference is that before he granted the land he had previously granted his right of fishery. Nor is it strange if he did so. At the time of Domesday Book this was border land contiguous to Wales, a country still the scene of fighting, or in which the King was obliged to have fighting men ready for action, and among them the men of Irchenfield, whose privilege it was to form the vanguard in attack and the rearguard in retreat, as Domesday informs us. It would be natural enough that he should give them a right of fishery, and that they should repay him by a promise of service. Says Mr. Upjohn, there is no evidence of such service being rendered. The service may have been military and fallen into desuetude, or may have been in money and been commuted. All this is far beyond human ken; but that in some way the King made a grant of this fishery seems a very natural supposition, and it is our duty, as I understand the law, to presume it was granted lawfully if it could be granted at all. The alternative is that the freeholders have been poachers for all these centuries. That would be the most violent presumption I ever heard of.

A point was made, properly enough, that such a grant, to a body of men who could be multiplied indefinitely by sub-division of the land, ought not in reason to be presumed. I think the answer is that the fishery has in fact been enjoyed for all these years, and its exercise has not destroyed the subject of the grant,

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and also that it has always been held subject to the laws of the land which regard the whole river and can prevent its destruction as a fishing river.

In my opinion, therefore, the defendants have established their right, and I prefer to place it upon the ground which I have already stated.

Mr. Micklem put forward another contention, namely, that a grant should be presumed from the King appurtenant to all the freehold of all the freeholders in these five parishes. The legal aspect of this contention is more difficult. Can there be a right of fishery appurtenant to land as distinguished from messuages? Can it be for more than is needed for consumption on the land or messuage? Can it be without stint? Can it run with each parcel of a sub-divided freehold, no matter how small? Had it been necessary I should have endeavoured to form a definite opinion upon these points of real property law. It is not necessary in my view.

I desire to add one further observation. In the Court of Appeal it seems to have been assumed that the defendants make no claim in gross. It is to be regretted that there should be a misapprehension on this score, for it is manifestly deplorable that a case should be decided here upon a ground which any of the judges thought to be abandoned in the Court below. Mr. Micklem told us that, substantially, the whole of his argument as second counsel was upon this point, which was raised in the pleadings and is noticed in Neville J.'s judgment. It may be that in the multitude of arguments there arose a misunderstanding. At any rate, the point is clearly open to the appellants and was fully argued.

Accordingly I am of opinion that this appeal should be allowed.

EARL OF HALSBURY. My Lords, I regret I am unable to concur with the judgment of the Lord Chancellor. It is singular that two cases raising in some respects the very same points should have come together for judgment before your Lordships. I think the present case may be very shortly stated, considering the elaborate consideration it has received

already, and I think it is important here to consider the case set up by the defendants and not to wander into considerations which I think are irrelevant, considering that which the plaintiffs and defendants have themselves placed on the Court as the question for decision.

I think the question in this case may be very properly stated, as it is in fact stated by Buckley L.J., and that is that the prescription in a que estate for a profit to be taken without limit, without stint, not with reference to the wants of the estate, but commercially for the purposes of sale, is unknown to the law. That is the right which the defendants here claim. I think with him it is impossible in law and cannot be maintained. I am quite satisfied with the judgments of the Master of the Rolls, Buckley L.J., and Kennedy L.J. with reference to the right and proof of possession by the two plaintiffs, and the only question is that which I have stated as the question between the parties. I decline to go into anything else. I think there is great force in the objections urged by the learned counsel for the plaintiffs as to the confusion between a manor and a hundred, but I think this has nothing to do with the question here. The hundred court has no connection with manorial rights. I think it is impossible to say that the result of the evidence suggests anything else but an effort to prove a right which the law has said cannot exist; and when you have proof of possession,—and as I say I think here proof of possession is sufficiently established by the three judgments in the Court of Appeal,—it is then for the defendant to shew by what right he claims to exercise the acts of ownership which he confesses upon the record he has exercised. It will not do when he is thus challenged by persons in possession to revert to the proposition that it is for the plaintiff to prove his case. If he has proved possession, that is his proof of property prima facie, and the plaintiff having thus established his right, if the defendant does not give any evidence justifying the acts which have been thus pleaded in confession and avoidance, the result must be a verdict for the plaintiff.

I am quite satisfied with the reasoning of the Court of Appeal.

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I do not think I can add anything to it. It is accurate in my view, and I find nothing whatever in the course of the evidence calculated to shake the conclusive reasoning of that Court. I am, therefore, of opinion that the judgment of the Court of Appeal ought to be affirmed, and I move your Lordships accordingly.

LORD ASHBOURNE. My Lords, this is an action brought to restrain the defendants from exercising a right of fishing which they and their predecessors have always enjoyed. The Master of the Rolls in his judgment says: "It is a right which I am satisfied has been not only claimed but also exercised openly and continuously far beyond living memory and for at least three centuries, ... and the right has been so exercised not for purposes of sport, but for commercial purposes."

Kennedy L.J. is equally emphatic: "Upon the evidence before us there is no doubt that for about three centuries freeholders of these five parishes, or townships, that is in the same position as the present defendants, have notoriously and publicly asserted and have exercised sed nec per vim nec clam nec precario the right of fishing which the defendants claim in their defence."

Wide and far-reaching as is this acknowledgment, I would myself not limit the proved user to three hundred years. I am disposed to think it much exceeded that long period, and Domesday Book (before which the locality was probably terra regis) and the mass of old documents cited would indicate a very remote antiquity, possibly before 1297, for the user of this right of fishing.

The Court of Appeal has said that such a right cannot lawfully exist, and now that it has been challenged, after all these centuries and the user of generations, it must be set aside as not being recognized by the law of England.

I think that the great question in the case is, Cannot a legal origin be presumed for this usage centuries old?

The great case of *Goodman* v. *Saltash Corporation* (1), decided by some of the greatest lawyers who ever sat in this House (including

(1) 7 App. Cas. 633.

Lords Cairns, Selborne, Bramwell, and Watson), has in my opinion been given no undue weight in the argument addressed to your Lordships. The facts, it is true, were not identical with the facts of this case. If they were it would be obviously decisive. Its facts were not found in any previous authority, but the eminent men I have mentioned applied their great powers to conceive a possible legal origin to support a long-continued user, and, by a bold exercise of their vast resources, they succeeded and found that in the original grant to the corporation there must have been a condition or trust in favour of the claim made, although there was no trace of the original grant or the condition or trust. It was a splendid effort of equitable imagination in furtherance of justice. The conception was reasonably possible and that sufficed. As Lord Cairns put it, "There is no difficulty in supposing a grant to the corporation before the time of legal memory of a several fishery,—a grant by the Crown,—with a condition in that grant in some terms not before us but which we can easily imagine,—a condition that the free inhabitants in question should enjoy the right as they have enjoyed it from time immemorial."

The great value of the case is the authority it gives to the doctrine that, where practicable or reasonably possible, a legal origin should be imputed to and found in support of a long-continued user.

A great mass of documents has been produced, but I am disposed to agree with Neville J. that "taking it as a whole it is not inconsistent with the right set up by the defendants, and it confirms the view that the modern user was in accordance with an ancient right." When the case of *Chesterfield* v. *Fountaine* (1) came before Wills J. and Wright J., they held that the right claimed by the defendants was legally capable of proof.

It is stated that the fishery has of recent years increased in value, and this would go to shew that the right claimed to catch fish has not destroyed the fishery or been unduly abused. The usage upheld in *Goodman* v. *Saltash Corporation* (2) was one that tended to the destruction of the fishery, and, if continued, would destroy it.

(1) [1908] 1 Ch. 243, n. (2) 7 App. Cas. 633.

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I have come to the conclusion that it is reasonably possible and probable that the right claimed had a legal origin. The King may have made a grant to freeholders of the area of fishing in gross, and this may have made them a corporation; or the King may have made a grant to an existing corporation upon trust for the freeholders.

As I have had the advantage of reading the judgment of the Lord Chancellor, in which I concur, and as he has gone into the matter in detail, I do not deem it necessary to say more than that I think that the appeal should be allowed.

LORD MACNAGHTEN. My Lords, I agree with my noble and learned friend Lord Halsbury.

This case was argued most ably on both sides.

I share the regret which has been expressed that a practice which has existed from time immemorial should be challenged now, whether the practice has or has not been altogether uniform and consistent, and whether there is or is not a legal foundation for the practice. But having listened attentively to the argument at the Bar and having read more than once the oral and documentary evidence adduced in the Court of first instance, I cannot see any legal ground for disturbing the judgment of the Court of Appeal.

LORD GORELL. My Lords, in this case the plaintiffs seek to restrain the defendants from fishing in the waters of the Wye, up to the middle of the stream, opposite the lands of the plaintiffs respectively.

Neville J., before whom the case first came, dismissed the action, but on appeal to the Court of Appeal his decision was reversed, and an injunction granted.

The plaintiffs' claim is based on riparian ownership, and the defendants set up a claim of right, as freeholders in certain parishes adjoining the Wye, to fish in the waters of that river between Blackwell's Ditch, to the north, and Gorse Acre gate, in Strangford, to the south. This stretch of the river is some seven miles in length. The Earl of Chesterfield has land on the right bank part of the way along this stretch, and the other plaintiff,

Mrs. Foster, has land on the left bank, which is opposite part of that owned by the Earl of Chesterfield. The defendant Harris is a freeholder in the parish of King's Caple, and the defendant Bailey is a freeholder in the parish of Hentland. Both these parishes adjoin the river Wye, and, together with three other parishes, are riparian parishes in the hundred of Wormelow. There was considerable dispute as to whether there was a manor of Wormelow coterminous with the hundred. The assertion of the defendants is that all the freeholders of these five parishes have similar rights of fishery.

My Lords, I do not propose to go in detail into the facts, which are very fully stated and discussed in the judgments delivered in the Courts below, because the result of the arguments before your Lordships is that there are three points which are the substantial points for consideration.

The first of these points is whether or not the plaintiffs have shewn any right of suit against the defendants. The documents upon which the point depends were exhaustively examined and criticized by counsel in the course of their arguments before this House, as they no doubt were in the Courts below. I see no reason for arriving at a different conclusion from that reached by the Court of Appeal, where this point was very fully gone into in the judgments, and it was held that the plaintiffs had sufficiently established their title to sue.

The real points in the case are those which arise in connection with the assertion of the defendants' rights. These points were argued at very great length, and numerous authorities were cited; but ultimately the defendants' rights were rested upon one or other of two propositions, the first of which is that the defendants and every freeholder in the said five parishes all have a right to fish in the part of the river in question without stint, and for gain as appurtenant to their respective freeholds; and the second is that they have this right under a presumed grant from the Crown by which the freeholders of the five parishes were incorporated; or that there must have been a grant to some then existing corporation in trust for such freeholders, and that they are entitled to have the benefit thereof.

The first proposition is very fully dealt with in the judgments

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in the Court of Appeal, and a very large number of authorities were cited to your Lordships.

The suggestion is that a separate grant to each freeholder ought to be presumed with a right appurtenant to his freehold to fish without stint, in common with all other freehold tenants. It is impossible to step back and pierce the mists of the past so as to ascertain how this claim originated. It is said that the territory along the Wye Valley was King's land and part of a forest, and an attempt was made to trace a manor of Wormelow, and to follow the history of the hundred of Irchenfield or Wormelow. Your Lordships cannot ascertain the exact facts, but the documents and the evidence of the witnesses at the trial shew that an alleged right has been exercised openly, notoriously, and continually for centuries by freeholders of these parishes, but not quite consistently, for the following points may be gathered from the documents and evidence: that possibly in early days all the freeholders of the hundred were allowed to fish (see County Placita, 1292, which, however, relates to fishery through lands at Fogehope), and that in 1637 there was a presentment that "every freeholder of the said manor or hundred (whose freehold is situate in either or any of the parishes or townships adjoining to the river) have and ought to enjoy a right of free fishery in the rivers Wye and Garren for themselves and their domestic servants, for all such freehold as lies within any or either of the parishes, villats, or townships which adjoin to the aforesaid river, except in such parts of the said rivers where any of His Majesty's subjects have or ought to have a right of free fishery, either by grant of the said King or any of his ancestors, or by prescription" (Record, vol. ii., p. 142); and that in 1638 there was a similar presentment with regard to the "tenants of the said manor," but that if any tenant take any salmon or salmons in the Wye and have a purpose to sell the same, they ought to bring them to the Fishboard at Horewithy, and offer them there to be sold at a certain rate before bringing them to any market town, &c. (Record, vol. ii., p. 143), and that in 1639 there was another presentment of a similar character (Record, vol. ii., p. 145); and that in 1822 there was a presentment which confined this privilege to riparian freeholders, but which, it is

said, does not correctly represent the user (Record, vol. ii., p. 256).

The evidence of the witnesses is not quite in accord. The Rev. Mr. Wilton speaks of everybody living in the hundred of Wormelow being entitled (vol. i., pp. 191, 192); so also does Mr. Fountain (p. 266), while others confine the right to the freeholders of the five riparian parishes; and further, the practice appears from the evidence not to have been confined to the freeholders and their domestic servants (see pp. 218, 219, 224, 236, 253), but they appear to have had the assistance of other persons. I do not think, however, that much importance need be attached to these circumstances, and the case appears to have been treated in the Courts below on the footing of the claim of the freeholders in the five riparian parishes; but it is important that the right claimed is not for the purposes of sport or of supplying the household, but for commercial purposes, and large quantities of salmon and other fish are regularly sold in Birmingham, Hereford, and other places, and the old board at Horewithy has disappeared.

If such a claim of right as appurtenant to every freehold in the five parishes can be supported, a remarkable result would be produced, for, while a right appurtenant to a freehold necessary and convenient for the enjoyment of the freehold has a natural limitation, the present claim would appear to admit of the freeholds being indefinitely divided, of the creation of any number of freeholds, and of the exercise of the right by every one of the owners; so that practically, by conveying infinitesimal portions of freehold, any number of fishing rights could be created. This was not disputed by the appellants' counsel, but, as I gathered, they contended there was a practical limitation by the amount of fish which could be properly taken, by the several by-laws for the river, and by the season. These suggestions do not seem to me an answer.

I agree with the judgments of the judges of the Court of Appeal on this first point. Assuming that the difficulties of presuming a grant of a right appurtenant to the freehold, which the Master of the Rolls points out, could be got over, the question is whether by English law an unlimited commercial right of fishing in alieno solo can pass as appurtenant to land; and here it should be

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noticed that this right is not claimed as a right in gross in the individuals, but as appurtenant to the freehold, though possibly there may originally have been some rights in gross in individual freeholders which, at a later period, have been assumed to be appurtenant to freeholds. A very large number of authorities were referred to which dealt, speaking of them generally, with rights which were either necessary to, or convenient for, the enjoyment of land, but are far from supporting the proposition that an unlimited commercial right of fishing in alieno solo can pass as appurtenant to land. No natural connection or relation whatever between the needs of the estate and the right of fishing is involved in this idea. To my mind, no ground has been shewn for presuming such a grant or for holding that it had a legal origin.

The second proposition is that as a grant to a corporation could have a legal origin, it ought to be presumed that there was such a grant in this case, either to the freeholders, or in some way in trust for them ; and on this point the case of *Goodman* v. *Saltash Corporation* (1) was cited. That your Lordships may presume from the long continuous enjoyment of the alleged rights that they had a lawful origin, if they were capable of such origin, was not disputed ; but the question is whether in this case such a presumption ought to be made if it is inconsistent with the past and existing state of things.

Now it seems desirable at the outset of the consideration of this point to see what the case made by the defendants was. I confess that I cannot read their statement of defence as asserting that these alleged rights were founded on any corporate position, or as making any reference thereto. The right relied on appears to me to be asserted as in individual freeholders with rights alleged to be appurtenant to their respective freeholds. Now, although the point was made that the Court could presume a grant from the Crown in this case, and it was argued that such a grant would incorporate the freeholders quoad the grant (2), I cannot but feel, from the allegations in the statement of defence and the fact that the point is only briefly dealt with by Neville J. and the two Lords Justices, while it is not referred to by the Master

(1) 7 App. Cas. 633. (2) [1908] 1 Ch. at p. 234.

of the Rolls, that less importance was originally attached to it than has been the case before your Lordships ; and the reason seems to me to be that the real case of the appellants has been, and is, based upon their individual position as freeholders, each with an alleged independent right appurtenant to his freehold.

In support of this view it is to be noticed that there is no trace of any corporation having existed at any time, or of any meetings or corporate action of any kind, and, moreover, the action of those who have fished seems to me to be quite inconsistent with any such idea. They appear always to have acted, and still claim to act, as independent freeholders, respectively asserting rights which they claim are appurtenant to the respective freeholds. Nor is there in this case any trace of any corporation through which the fishing rights could be asserted, as in *Goodman's Case*. (1)

In my opinion, to presume a grant to a corporation, the creation and existence of which it seems unreasonable to believe in, would be endeavouring to support a right which is insupportable on the real ground upon which it has been exercised. The language used by Fitzroy Kelly C.B. in *Lord Rivers* v. *Adams* (2) is not inappropriate to the present case. He said : "There is another reason against making this presumption which was strongly and properly pressed by the learned counsel for the plaintiff, and which is not applicable to any of the cases in which similar presumptions have been made, viz. : that we are asked to presume the action of the Crown in favour of a right in the inhabitants, which could not exist as a custom because it is unreasonable and contrary to law, and that the Crown, because this could not be done otherwise, got over this difficulty several hundred years ago by making them into a corporation. We cannot make this presumption, not because it is improbable but because it is most unreasonable."

My conclusion is that, long as the defendants and their predecessors have fished these waters, they have not had a legal right to do so although they have fished in the assertion of a right. Their action seems to have been more or less tolerated, but their rights have not been fully tested until this case.

Although I share the anxious desire of the Master of the Rolls

(1) 7 App. Cas. 633. (2) (1878) L. R. 3 Ex. D. at p. 367.

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to support, if it be possible, a right which has been claimed and exercised for a very long period, I think that the general considerations which I have presented shew that the judgment of the Court of Appeal was right and should be affirmed.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the Lord Chancellor. The titles and records in this case extend over many centuries, and I think it is impossible to peruse these titles and records and to entertain doubt of the enjoyment in fact of salmon fishing in the Wye by the freeholders in these five riparian parishes within the limits mentioned in the case,—this enjoyment being in the exercise of what was considered by all concerned as a right, and openly asserted as such.

I think, accordingly, that this is pre-eminently a case for the application of the principles of the case of *Goodman* v. *Saltash Corporation.*(1) I do not see my way to hold that the right thus asserted and enjoyed for centuries must now be declared to be void and of no effect because it is inconsistent with legal concepts. It appears to me, on the contrary, that the rights of fishing as asserted and enjoyed by these freeholders may, on the principles of *Goodman's Case* (1), with perfect propriety be presumed to have had a legal origin.

I do not presume to restate the narrative given by my noble and learned friend on the woolsack, but upon the ground which I have in the above sentences mentioned I base my support to the motion that this appeal should be allowed.

Lord Kinnear not being present judgment was reserved till July 17.

July 17. EARL LOREBURN L.C. My Lords, Lord Kinnear is not able to be present to-day, but he considers that the order appealed from ought to be affirmed.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 17, 1911.

Solicitors: *Meredith, Mills & Clark, for E. L. Wallis, Hereford; R. S. Taylor, Son & Humbert, for Gwynne James & Son, Hereford.*

(1) 7 App. Cas. 633.

[HOUSE OF LORDS.]

KEATES . . . . . Appellant; H. L. (E.) 1911

AND

LEWIS MERTHYR CONSOLIDATED COLLIERIES, LIMITED . . . . . Respondents. *July* 17.

Master and Servant—Dispute between Employer and Workman—Subsisting Claims—Jurisdiction of Court of Summary Jurisdiction to adjust and set off—Set-off of Employer's Claim for Damages against Workman's Wages—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 3, *sub-s.* 1; *s.* 4.

A workman owed his employer money for damages for breach of contract. The employer owed the workman wages. Upon a summons by the employer against the workman claiming the damages and that the damages and the wages should be adjusted and set off, the workman contended that the Court had no jurisdiction to set off the damages against a claim for wages which he had not made:—

Held, that the Court had the jurisdiction to adjust and set off the two sums against one another by virtue of the Employers and Workmen Act, 1875, s. 3, sub-s. 1.

Decision of the Court of Appeal, [1910] 2 K. B. 445, affirmed.

The facts material to this appeal and the arguments on both sides are clearly and fully stated in the judgment of Lord Robson, where also s. 3, sub-s. 1, of the Act is set forth.

May 30. *Bailhache, K.C.*, and *John Sankey, K.C.* (*Clive Lawrence* with them), for the appellant.

Danckwerts, K.C., *Stewart Brown*, and *H. H. Harding*, for the respondents.

The House took time for consideration.

July 17. Lord Atkinson. My Lords, the question for decision in this case turns upon the construction of s. 3, sub-s. 1, of the Employers and Workmen Act of 1875, and resolves itself into this: Do the words of that sub-section mean that the claims which the Court may adjust and set off are claims which the employer or

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workman has a right to make, though he has in fact omitted to put them forward in the proceedings arising out of the dispute mentioned in the section? Or are the words to be confined to claims which have in fact been put forward in those proceedings by the person who has the right to make them? In the construction of a statute it is, of course, at all times, and under all circumstances permissible to have regard to the state of things existing at the time the statute was passed, and to the evils which, as appears from its provisions, it was designed to remedy. And I think nothing could be more unsafe or more misleading than to allow oneself to be deterred from putting upon a statute the particular construction which the consideration of these things would lead one to adopt, by the apprehension of the prejudicial effect it might have on rights and privileges conferred by subsequent legislation, unthought of at the time the particular statute was passed. It is necessary, then, to ask oneself what were the respective rights and liabilities of employer and employed in the year 1875; and what the jurisdiction and power conferred on county courts to set off the respective claims of litigants who might come before them. The doctrine of common employment was then well established and in full operation. The Workmen's Compensation Act had not been passed. The employer who paid the wages he owed, who did not dismiss illegally and was not guilty of personal negligence in the selection of the fellow servant of the complaining workman, or of the machine with which that workman had to work, could not well be sued either in tort or contract; and the workman on his side would seldom, if ever, be sued save for damages for breach of his contract of service by leaving his employment without adequate notice, or for damages for negligence in discharge of the duties his contract of employment imposed. Claims such as these were likely to be comparatively small in amount, and would be fully met by the sum of 50*l.*, the highest amount the county court could award.

By the combined operation of the 76th section of the County Courts Act in force in 1875 (9 & 10 Vict. c. 95) and the 88th and three following sections of the Judicature Act of 1873, it is clear that the county court had already ample jurisdiction to set off claims such as are in this case dealt with, if put forward in a

litigation before it. But the statute of 1875 was passed, as set forth on the face of it, to enlarge the powers of the county courts, not to leave them as they were. And it has enlarged them in a most remarkable way. The Court may now, under this very section (s. 3), give relief which not only was never claimed by either of the parties litigant, but which is directly in conflict with the relief claimed, and setting at naught the rights they respectively insist upon. For instance, if an employer should sue his workman for damages for breach of contract by refusing to do the work he had contracted to do, and the workman insisted that the work he refused to do was not work which under his contract he was bound to do, each party thus insisting on the contract between them, each standing, as it were, on the "letter of his bond," the county court judge could, in defiance of this insistence, dissolve the contract, apportion the wages earned under it, and award damages, presumably for its breach, or for its termination, as the case might be, to either of the parties litigant. Not one of which things was claimed by any one concerned. Again, instead of awarding damages he might, under sub-s. 3 of s. 3, take security from the party in default for the due performance of so much of his contract as remained unperformed, if the defaulter consented to that course. It is obvious that this peculiar quasi-parental jurisdiction was conferred in the interest of industrial peace, and should not be hampered by rules of pleading. Well, s. 3 confers jurisdiction in addition to that already possessed by the county courts—for what end? In order, in the words of the statute, to "adjust and set off one against the other all such claims on the part either of the employer or the workman arising out of or incidental to the relation between them as the Court may find to be subsisting." It is conceded that these claims may have no connection whatever with the particular matter in dispute between the employer and the workman. The claim may be a claim for wages which the employer admits to be due. It need not be a contested claim, but, according to the argument of the appellant, the party sued can oust the operation of this remedial statute, and leave things in precisely the same position as if it never had been passed, simply by omitting to give the notice required by

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the 76th section of the 9 & 10 Vict. c. 95, though there be no danger of surprises. In my view, the consideration of s. 3, sub-s. 1, should be approached from an entirely different point of view from that suggested by the appellant. I think that the object of the statute being, as in my opinion it obviously is, to promote industrial peace, and, with that end, in the case of any dispute between employer and workman coming before the county court to secure the adjustment of all claims for debt or damages, wages, or other liability subsisting between them, whether connected with this dispute or not, one's attention ought to be directed to see whether there is any provision of the statute so clear and imperative as to prohibit the exercise of the benevolent jurisdiction conferred by it in such a case as the present. I think the words "claims" which the Court "may find to be subsisting" are adequate, though not happily chosen to indicate claims which the Court may find either party has the right to make, whether they have in fact put them forward in the litigation or not, and, therefore, that the county court judge had in this case power to make the decree or order he made, and that the judgment of the Court of Appeal is therefore right and should be affirmed.

It was urged in argument that if the county court, or a Court of summary jurisdiction, has the jurisdiction exercised in this case, the employer might make a claim before either of these tribunals for a small sum, and that under such circumstances the tribunal whose jurisdiction he invoked would have power to adjudicate upon a claim of the workman, under the Workmen's Compensation Act, for compensation in respect of an injury sustained by him. I wish to say emphatically that I express no opinion upon that point. It does not arise in this case. The latter statute does not affect the claims adjudicated upon here. If unfortunate results of this kind, which must have been unforeseen in 1875, follow, it is a matter to be set right by the Legislature. But whether they do follow or not affords, in my view, no justification for construing the Act of 1875 otherwise than it should be construed if this later statute never had been passed.

LORD SHAW OF DUNFERMLINE. My Lords, I agree.

LORD ROBSON. My Lords, this case turns on the effect to be given to the word "claims" in s. 3 of the Employers and Workmen Act, 1875.

The section confers on a county court the power in any proceeding before it in relation to any dispute between an employer and a workman, arising out of their relations as such, to "adjust and set off, one against the other, all such claims on the part either of the employer or of the workman arising out of or incidental to the relation between them as the Court may find to be subsisting whether such claims are liquidated or unliquidated, and are for wages, damages or otherwise." Sect. 4 provides that this comprehensive power may also be exercised by a Court of summary jurisdiction, and it has been so exercised in the present case.

The magistrate has found the workman indebted to the employer in the sum of 11*s.* 3d. for damages for breach of contract. Acting under the above section he has also, on the invitation of the employer, inquired whether there are any claims on the part of the workman against the employer incidental to the relation between them, and he has found one such claim to be subsisting, namely, for a sum of 1*l.* 15*s.* 8*d.* earned, and due in respect of wages. He has, therefore, directed the 11*s.* 3*d.* to be set off against the larger sum, leaving 1*l.* 4*s.* 5*d.* only to be paid by the employer.

The workman contends that the jurisdiction to do this only arises where the claim, which the magistrate assumes thus to adjust and settle by means of set-off, is a claim made before him by the party entitled to make it, and not merely, as in this case, a claim of which he has been judicially informed, and as to the existence and correctness of which he has judicially satisfied himself. The answer to this contention is to be found in the plain words of the section, which are in complete accord with the obvious intent of the statute as a whole.

It is a statute dealing with industrial disputes, and it seeks to provide certain Courts with a means of checking or composing such disputes so far as they are concerned with small pecuniary claims.

In the sub-section following the one just quoted the Act goes

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so far as to empower the magistrate wholly to rescind any contract between the employer and the workman if, having regard to all the circumstances of the case, he thinks it just to do so, "upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages or other sums due as the Court thinks just." This is a very unusual power, and shews that the county court judge or magistrate is being entrusted with a jurisdiction and discretion outside the limits of ordinary litigation. It opens a wide field of inquiry beyond the particular claim which one of the parties has brought before him. He is able, under this second sub-section, to exercise a power similar to but stronger than that which the appellant says is so novel and extreme that the Legislature cannot be taken to have intended it under the first sub-section. Thus, if he thought it expedient to rescind the contract between the parties, the claim or right to wages due would be one of "the circumstances of the case," and as such would be subject to the magistrate's discretionary powers in reference to apportionment and payment. It seems to me that some such power is necessary to give effect to either sub-section. The first sub-section aims at settling disputes by the adjustment of all subsisting claims, and the second aims at the same object by summary termination of contracts which it may have become irksome and dangerous to enforce. The scope of the statute being thus wide, there seems to be no ground on which the first sub-section can properly be read in a more restricted sense than its literal wording imports. In directing the magistrate to adjust all the claims between the parties which the Court "finds to be subsisting," the Legislature can scarcely be taken to have intended that the magistrate might find a claim for wages to be, in fact, subsisting between the parties, and yet be unable to deal with it in settling the whole account because the workman had not thought it necessary to sue for it.

But the appellant contends that the mere right to have the wages paid is not a claim at all. This appears to be only another way of saying it is not a claim preferred before the magistrate. The workman has worked in order to get his wages, and although he does not think it necessary to bring an action for them, it is

quite well understood between his employer and himself that he wants his wages, that he is entitled to them, and that he means to have them. If he refrains from formal or explicit demand, it is only because, in such circumstances, it is so well understood and implied that it does not need to be made explicit. I think that constitutes a claim within the meaning of this sub-section.

It has been pointed out that if the magistrates acted up to the full extent of the jurisdiction given to them by this statute we might have the most inconvenient consequences. When the statute was passed the claims between employer and workman were, for the most part, simple in character and small in amount. Since then they have become numerous, complicated, and substantial, and are no longer such as can be conveniently or properly disposed of by a magistrate acting under this sub-section, but most of them are confined to special tribunals, and I doubt if the mischief suggested would be serious in extent. The jurisdiction of the magistrate, however, is discretionary, and it is difficult to think that he would be so unreasonable as to exercise it in some of the extreme and inappropriate cases that have been suggested. In any event we have no power to construe this statute otherwise than according to its plain intent, and I think this appeal fails.

EARL LOREBURN L.C. My Lords, I agree with the judgments delivered by my noble and learned friends.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 17, 1911.

Solicitors: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & James, Pontypridd; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

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NEW MONCKTON COLLIERIES, LIMITED . APPELLANTS;

AND

KEELING . . . . . RESPONDENT.

Employer and Workman—Compensation—Death of Workman—Widow—Dependency—Total or partial—Legal Liability to support—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13, "*Dependants*," *First Schedule* (1.) (*a*) (i.) *and* (ii.).

Whether a particular person was dependent upon the earnings of a deceased workman so as to have a title to compensation under the Workmen's Compensation Act, 1906, is a question of fact.

At the death of a workman caused by accident his wife had not for more than twenty years lived with or been supported by her husband and had in no sense relied upon him for help:—

Held, that the wife was not entitled to compensation as a dependant upon her husband.

Decision of the Court of Appeal, [1911] 1 K. B. 250, reversed.

The facts material to this appeal appear in the judgments of Lords Atkinson, Shaw of Dunfermline, and Robson.

May 30; June 1. *Scott Fox, K.C.*, and *T. E. Ellison*, for the appellants.

Atkin, K.C., and *R. A. Shepherd*, for the respondent.

The House took time for consideration.

July 18. EARL LOREBURN L.C. My Lords, I agree with the judgment about to be delivered by my noble and learned friend Lord Atkinson, which I have had an opportunity of reading.

It is a question of fact whether a particular person is a dependant or not. The Act was passed to provide compensation for certain people who should be damnified because the workman ceased to earn wages. If thereby they were either deprived of actual support or deprived of a source on which they did and would reasonably rely for it, they may be damnified to a degree greater or less according to the circumstances. The fact that a legal duty lay upon the workman to provide

maintenance is an element to be considered, no doubt, because people usually count upon getting what they are entitled to get. But when, as here, the wife had not been supported for twenty years and in no sense relied upon the workman for any help, I think there was no evidence of dependency. In my opinion this appeal should be allowed.

LORD ATKINSON. My Lords, I have read through the notes of the county court judge in this case more than once without being able to discover any express finding that the respondent was either wholly dependent on the earnings of her deceased husband at the time of his death, or partly dependent upon them. In the judgment of the Master of the Rolls, however, I find the following passage: "The learned county court judge has not found in this case that the widow was wholly dependent; but he has proceeded upon the footing of partial dependency, and has awarded somewhat less than she would have been entitled to if it had been a case of total dependency. Nothing turns upon the figures here." I, therefore, assume that the county court judge was of opinion that the respondent was, at the time of her husband's death, January 5, 1910, only partly dependent upon his earnings within the meaning of the Workmen's Compensation Act of 1906. The county court judge has omitted to state in his notes on what principle he arrived at that conclusion; but as it appears to me, his finding, if sustained at all, can only be sustained on the ground that, in such a case as this, there is some presumption of law that a wife is, within the meaning of the statute, dependent on the earnings of a husband if he is under a legal obligation to maintain her; I assume he has proceeded on that principle.

Isaac Keeling, the respondent's husband, had never during a period of over twenty years immediately preceding his death contributed one farthing out of his earnings, or at all, to the support and maintenance of his wife, and I cannot conceive how any reasonable man could, upon the evidence, come to the conclusion that he had, in fact, maintained her wholly, or in part, or that there was any reasonable probability that he would ever do so, either voluntarily or under compulsion.

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She left him in 1888, taking her children with her. He was in the habit of thrashing her, she said. He then promised to pay her 1*s.* 6*d.* per week, but never did so. She then lost sight of him. She made inquiries about him, but could not find him. She got a lawyer to write to him, but he took no notice of the letter. He continued to live at the house both of them occupied at Kirk Folly till 1890, and then left for Mansfield. She did not hear of him for a very long time after he left Mansfield. She never communicated with him, directly or indirectly, from thenceforward, never made any claim upon him, or received anything from him.

After she had left him she lived with her parents for some time, working occasionally as a servant in their house, and occasionally in a factory, and for many years before his death, and up to that event, she had been employed as housekeeper by two miners, receiving from them as wages 16*s.* per week, out of which she had in fact exclusively maintained herself.

She has reared her children. They have for some time been married and placed out in life. It certainly would appear to me that this evidence clearly establishes that, apart from the presumption I have mentioned, Alice Keeling was in fact at the time of her husband's death no more dependent on his earnings than she was on the earnings of any member of the community of whom she had never heard, and from whom she had never received one farthing for her support. It may be that her husband was in law bound to maintain her, but it is by the discharge of this obligation, not by its mere existence in law, that a husband supports and maintains his wife.

It cannot in the nature of things be on the mere possession of a legal right, but rather on the effective enforcement of it in some shape or form, that a wife relies for her support. It is also, in my view, impossible to come to the conclusion that there was any reasonable probability that she would ever enforce her right against her husband, or look to the result for her subsistence to any extent.

It is only necessary to read the provisions of the statute of 1906 and its schedule to see that the sums to be awarded under

it are intended to be compensation for the pecuniary loss sustained by reason of the loss or cessation of the workman's power of earning.

No doubt in the case of death an arbitrary sum, three years' earnings, is, subject to the limit mentioned, under r. 1a (1.) fixed as the amount of compensation, but in sub-head (ii.) of the same rule, dealing with partial dependence, it is clear that the word "injury" means damnum, and the main provisions of the statute shew that its object was such as I have mentioned. Well, if it be asked what was the pecuniary loss sustained by Alice Keeling by reason of the cessation of her husband's power to earn, what the money value of an obligation there was no reasonable probability he would ever discharge to any extent, the answer must, I think, be that it was nil. And if that be so, the award of the arbitrator, in its results, defeats the object and intention of the statute.

Now as to this presumption of law upon which the award would appear to be based, no doubt the Court of Appeal have, in many decisions, laid it down that this presumption exists, and have tenaciously adhered to their opinion. One might, I think, have not unnaturally expected that the authority of the principle thus established could not, as a judicial guide in cases such as the present, have survived the decision of your Lordships' House in the case of *Hodgson* v. *West Stanley Colliery* (1) if not of its decision in *Main Colliery Co.* v. *Davies* (2) when rightly understood.

In the former of these cases the legal obligation of the husband to maintain his wife was in full force and effect up to the time of his death. His wages were substantial—2*l.* per week; but he and his two sons, who perished with him in the same accident, contributed in equal shares to the family chest, out of which all the family were maintained. The arbitrator found, according to the fact, that the mother was partly dependent on her husband and partly dependent on each of her two contributing sons. The Court of Appeal reversed that decision, and it was contended in argument before this House that when contributions are made to a common fund they are in law held to be paid to the father;

(1) [1910] A. C. 229. (2) [1900] A. C. 358

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that the circumstance that the actual payment was made to the mother was irrelevant; that the obligation was on the head of the family, and that there could not be a dependency partly on the father and partly on the sons; that the father being, in the eye of the law, wholly responsible, there could be no further liability arising out of the same accident. Well, your Lordships held that this contention was unsound, and that the decision of the Court of Appeal was erroneous and should be reversed, not at all, however, upon the ground that this legal presumption existed and was rebutted by the evidence in the case, but on the ground that it did not exist at all, that the question of dependency was purely a question of fact, and should be decided according to the facts proved, irrespective altogether of any legal presumption.

At p. 231 of the report the Lord Chancellor thus dealt with the matter: "The second objection when analysed is as follows: It was argued that the mother was, in the eye of the law, wholly dependent upon her deceased husband, and, being so, could not possibly be in any degree dependent on her two deceased sons; for that would involve a logical contradiction. This supposed doctrine of law was, to begin with, presented to your Lordships as an inexorable rule. Later on Mr. Mitchell-Innes so far unbended as to admit that it might be only a rebuttable presumption. But when asked if the presumption could be rebutted by conclusive proof that it was diametrically opposed to the fact, as here, he would not admit that it could be so rebutted. How a presumption could be better rebutted I do not know. In this argument I am told that I am by law required to affirm something which every one knows is entirely false. The short answer is that the law requires no such thing. There are such things as legal fictions . . . . but this is not one of them. The mother was not, in law, wholly dependent on her deceased husband. She and her family were dependent on those who supplied them with the means of subsistence, namely, in the present case, her husband and each of her two sons." And again at p. 233, "It is for the arbitrator or county court judge to ascertain, purely as a question of fact, who are dependent and to what extent."

Lord Collins, whose judgment in *Coulthard* v. *Consett Iron*

Co., Ld. (1) was so much relied upon, entirely agreed with that judgment, which he stated he had had the opportunity of reading.

And Lord Macnaghten, at p. 236, thus expressed himself: "On the real point at issue there is little to be said. The question of dependency is not a question of law at all. It is purely a question of fact. If authority were wanted for a proposition so self-evident, there is the case of *Main Colliery Co.* v. *Davies* (2), a decision of this House in which there is an explicit statement to that effect. The view of the Court of Appeal seems to be based on a misconception of Lord Halsbury's judgment in that case. Nothing could be plainer than his Lordship's language, 'What the family was in fact earning, what the family was, in fact, spending, for the purpose of its maintenance as a family, seems to me,' says his Lordship, 'to be the only thing which the county court judge could properly regard.'" And again at the bottom of the same page: "It seems to me, with all respect to the Court of Appeal, that the more recent decision of that Court, on which the judgment under appeal is founded, cannot be supported. I agree in the dissentient judgment of Buckley L.J. in *McLean* v. *Moss* (3), and in the earlier decisions of the Court of Appeal in which my noble and learned friend Lord Collins took part as Master of the Rolls." This judgment of Buckley L.J. was unanimously approved of. In it that learned judge distinctly states that dependency is not dependent on the legal liability of the deceased to maintain his wife.

It by no means follows, however, that though there is no presumption of law that a wife is dependent upon her husband's earnings merely because of his legal obligation to maintain her, this legal obligation is to be ignored in deciding on the fact of her dependency. On the contrary, the existence of the obligation, the probability that it will be discharged, either voluntarily or under compulsion, the probability that the wife will ever enforce her right if the obligation be not discharged voluntarily, are all matters proper to be considered by the arbitrator in determining the question of fact whether, or not, the wife, at the time of her husband's injury, looked to his earnings for her maintenance and

(1) [1905] 2 K. B. 869. (2) [1900] A. C. 358.
(3) [1909] 2 K. B. 521.

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support in whole or in part. It is one of the many elements to be taken into account.

In a recent case decided in the First Division of the Court of Session in Scotland, arising under the Act of 1897 (8 Fraser, 438), the Lord President, Lord Dunedin, deals with this question of the alleged presumption of dependency arising from the legal obligation to maintain in a manner so clear and convincing, and, in my view, lays down so soundly what the law is, both in Scotland and in this country, that I desire to quote, and, if I may, to adopt as my own, the following passage from his judgment. The passage begins at p. 441 of the reports, and runs thus: "But the expression which I rather take exception to is about there being a legal presumption that a wife is dependent on her husband, a legal presumption which in each case has to be displaced . . . . If by a presumption of law that a husband should support a wife he means that it is necessary you should start with that presumption according to the law of Scotland, and that that has necessarily to be rebutted by shewing that this particular wife was not dependent on her husband, I humbly do not agree. Taking the sentence in another aspect I quite agree. In a proper sense it is not a presumption at all, either of fact or of law, but it is an inference of fact drawn from experience of ordinary life, that if you know nothing about a wife except that she is simply the wife of a husband, more especially of the class with which we are here dealing, the woman is dependent on the husband, because men's wives in such a class are as a matter of fact usually dependent upon their husbands."

Assuming, then, that the finding of the county court judge was what the Master of the Rolls states it to have been, I think that there was no evidence before him which could lead reasonable men to the conclusion at which he arrived, that his award was, therefore, bad, and, with all respect to the Court of Appeal, that their decision was based upon an assumption decided by your Lordships' House on more than one occasion to be erroneous. Their decision should, therefore, I think, be reversed, and this appeal allowed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I agree that this appeal should be allowed.

In the case of *Hodgson* (1) I ventured to deal in some fulness of detail with the questions of dependency—whether there is dependency at all, or whether that dependency is total or is partial—as each and all questions of fact. And I thought it right to cite and to deal with various cases decided on that subject. With much respect to the learned judges of the Court of Appeal it humbly appears to me to be a mistake to think that the opinion which I then delivered in any respect stood alone. Upon examination this very clearly appears. Are these questions questions of fact or of law? Nothing could be plainer than the opinion of my noble and learned friend Lord Macnaghten on that subject, expressed in these brief words: "The question of dependency is not a question of law at all; it is purely a question of fact." Again, are these questions questions of fact, or are they governed by legal presumption? Nothing could be plainer than the judgment of my noble and learned friend the Lord Chancellor, who, after setting forth that it was for the arbitrator "to ascertain, purely as a question of fact, who are dependent and to what extent, and what they are to receive, and how the compensation is to be distributed," follows this up by adding "There is no room, that I can see, for legal presumption."

Speaking for myself, I am not able to see how the cases decided in the Court of Appeal, which have been treated as still binding upon that Court, can stand alongside of the judgment in the case of *Hodgson*. (1) I recognize very fully the difficulty in which the learned judges considered themselves to be placed on account of their views as to the state of the decisions; but it is worthy of remark that the facts of the present case appear to confirm in a somewhat marked degree the conclusions and principles there set down. I do not, of course, repeat my observations in the case of *Hodgson*. (1) Out of the respect which I entertain for the learned judges in the Court below I will, however, venture these observations:—

(1.) As to the facts; what are they? The widow of this unfortunate workman had not lived with him for twenty-two years. So long ago as that she left him, taking her children with

(1) [1910] A. C. 229.

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her; they are all now grown up and married. She has never, in the course of all these years, either lived with him, or met him, or received anything from him. For ten years she has been housekeeper to a miner, in whose house she has lived, and from whom she receives for his board 16*s.* a week. Another miner is a lodger in the household, and from him she receives 13*s.* per week. In this way, at the time of her husband's death and for years before she earned her own living. All this has happened independently of her husband, his obligations, or his earnings. She has lived an independent life. I shall speak of presumptions in a moment, but I cannot see it to be proved, nor, indeed, do I feel myself capable of imagining it to be the truth, that the appellant was in these circumstances dependent upon the earnings of her husband.

(2.) As to the statute; what does it provide? It provides that compensation shall be given, not to the members of the family of a workman who has lost his life by accident, but to those within that class (if any) who were dependent. "Member of a family" is defined in the Act, the definition practically containing a repetition of the category in Lord Campbell's Act, with the addition, if I mistake not, of "brother, sister, half-brother, and half-sister." The appellant, having been the wife of the deceased, falls within the class; and the inquiry then is whether, being within that class, she is entitled to compensation as one of the "dependants." That term means "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death." It appears to me, my Lords, that any expression appearing in the judgment of the learned judges in the present and preceding cases in the Court below which amplifies this dependency so as to make it include a dependency upon the husband's "obligations" or his "legal liability" is not warranted by the statute itself. What the statute says is that the dependency is to be upon the husband's earnings. If obligations or legal liability were the test, then dependency, in fact, at the time of the workman's death might in many cases be completely absent. The wife might be the possessor of a good going business, or have succeeded to a sufficiency of means, but the obligation and

the liability referred to would still remain in abstracto or de jure; it would be within the bounds of possibility that the business might go, or the means be lost, and then in such a contingency —it might be infinitely remote—the husband's liability would have to be resorted to. I think that illustrates the dangers of departing from the language of the statute, which, upon the whole, is simple and clear. Cases involving a certain amount of refinement must occur, as always happens in practical affairs. A case is, in one of the decisions, quoted of a husband leaving home for a month or two in search of work, the wife expecting his return and being in hopeless poverty, having, in short, her dependency as a very active fact in her life, and her husband's earnings being the thing, to use the language of Romer L.J., to which, and to which alone, she really looked for support. These cases of refinement do not appear to me to give any justification for doubting that the statute places the double fact to be established—of the relationship, in the first place, and among those related, of dependency—as facts both of which in a reasonable and actual sense must be established so as to enable the statute to apply. The Act of Parliament seems to say: Among the relatives of the deceased workman, if there be those who depended for support upon his earnings, and who by his death have lost that support upon which they depended, then let them be compensated for that loss.

(3.) As to the decisions. I should not, my Lords, myself have thought, as I have explained, that the cases founded upon in the Court below were still, after the decision in *Hodgson* (1), binding authorities upon the point relied on. *Coulthard's Case* (2) and the judgments of Romer L.J. and Mathew L.J. are founded upon in the Court of Appeal. The salient feature of *Coulthard* (2)—the case in which the widow was daily expecting her husband's return to provide a home, and in which she was subsisting in the meantime mostly on charity—is that it was treated by the learned Lords Justices named from the point of view that there was this destitution on the one hand, and the daily expectancy of the husband's return on the other, as a case for an inference of fact that she was dependent on his earnings at the time of his death. Romer L.J.

(1) [1910] A. C. 229. (2) [1905] 2 K. B. 869.

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is careful upon that subject. He puts it: "I think it might be so inferred, unless there were other circumstances to justify the conclusion that she had ceased to look to her husband's earnings for maintenance." Mathew L.J. so treats the case: "He fell out of work, the home was broken up, and the husband seems to have gone away in search of work; he took one of the children with him. I should infer from this that sooner or later he intended to resume his former position, and that meanwhile he was desirous of lessening the burden on his wife." Lord Collins quotes with approval Lord Moncrieff's judgment in the Scotch case of *Sneddon* (1), a case in which the existence of the "legal obligation" was not treated as standing alone, "but when that legal obligation, not discharged by the husband, concurs with total destitution on the part of the wife, an inability to support herself." As I say, I cannot find that *Coulthard's Case* (2) would have been a sufficient authority to set up the binding presumption which has been founded upon in the judgment of the Court below in this case.

Coulthard (2), however, was succeeded by the two cases of *Stanland* (3) and *Williams* v. *Ocean Coal Co.* (4), and there seems no doubt that by these combined judgments the presumption now being dealt with obtained a substantial footing in the law of England. "In the case of a wife," says the learned Master of the Rolls, "I think it is established by authority that there is a presumption in favour of the dependency of the wife. That was certainly asserted by us in *Stanland's Case*." (3) The county court judge in the case of *Williams* (4) had put the matter of fact thus: "I have come to the conclusion that it would be absolutely impossible for me really to hold that this lady at the time of the death of the workman was dependent upon his earnings. To hold that would be holding, in my opinion, that to be a fact which was not a fact—to hold that which is really untrue." It was held that this was a misdirection, upon the ground, inter alia, that the learned judge had gone wrong by "first ignoring the presumption." I cannot at present understand how these cases can now be set up, conflicting, as they do, with the passages which I

(1) (1904) 6 F. 992.
(2) [1905] 2 K. B. 869.
(3) [1907] 2 K. B. 425, n.
(4) [1907] 2 K. B. 422.

have ventured to cite from the judgment in *Hodgson's Case* (1) in this House. I am of opinion that the judgments and dicta in these cases, in so far as they dealt with or depended upon the legal presumption referred to, were erroneous.

My Lords, what is the value of presumption in relation to the ascertainment and settling of truth in matters of fact? The legal value in such a relation is that it forms a guide where doubt exists; it assists elucidation where inferences might conflict; and it settles in one direction the balance of the judgment in favour of the establishment of truth which is only dimly or partially ascertained. But where the facts *are* ascertained, where there is no difference as to the inference which flows from them, and where the truth is plain and proved, I am at present at a loss to understand what is the value, or cogency, or appropriateness, of presumptions. And I view with much disrelish the idea that they can be invoked for the purpose of affirming that a thing is true in law which is not true in fact. The present case appears to me plainly to illustrate this position. To put it in a word, this wife did not depend upon her husband's earnings. For over twenty years she knew nothing of him, lived a separate life, and earned independently her own living. One of the learned judges says that it is not established that there was any one else than her husband that she was dependent upon. I agree, my Lords. But it is established that she was independent of him and of anybody.

My Lords, the course of the decisions in Scotland has been very different from that of those in England. In an early case of *Cunningham* v. *McGregor* (2), Lord Young, in a single sentence of his judgment, referred to "the legal presumption that a wife is wholly dependent on her husband." That observation has been much and justly commented upon, but in justice to the learned judge, and as bearing not remotely upon the present case, it is fair to quote his very next sentence, which was to this effect. He had, as I have stated, referred to "the legal presumption that a wife is wholly dependent on her husband"; but he follows on: "There might be facts which shewed that the case was otherwise, but these facts (that is, the facts in *Cunningham's Case* (2)) do

(1) [1910] A. C. 229. (2) (1901) 3 F. 775.

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not." Still, his general proposition has been considered in Scotland as of an unsettling tendency, and, accordingly, in the judgment of *Baird & Co.* v. *Birsztan* (1) the Lord President expressly repudiates that part of the judgment, and he places this portion of the law—adopting, as I respectfully do in its entirety, his language—upon a sound foundation. "In a proper sense," says his Lordship, "it is not a presumption at all either of fact or of law," . . . . "but it is an inference of fact drawn from the experience of ordinary life that, if you know nothing about a wife except that she is simply the wife of a husband—more especially in the class with which we are here dealing—the woman is dependent on her husband, because men's wives in such a class are, as a matter of fact, usually dependent on their husbands."

It does not stop there, my Lords, because in the subsequent case of *Lindsay* (2) this view of the law has been expressly followed, and the language of the Lord President, together with his criticism of Lord Young's judgment in *Sneddon's Case* (3), has been expressly adopted by Lord Ardwall in the Second Division. I referred to *Turners* v. *Whitefield* (4) in my judgment in *Hodgson's Case* (5), and I only add to my reference humbly approving of that decision the observation that I consider the judgment of Lord Stormonth Darling in the case of *Lindsay* (2), in which he cites largely from *Turners* v. *Whitefield* (4), to be a clear and conclusive statement of the law of Scotland. Putting these three judgments—*Turners* (4), *Baird* (1), and *Lindsay* (2)—together, I am glad to find that the simplicity and plainness of the provisions of the statute are unmistakably affirmed, and the point of fact, as distinguished, on the one hand, from liability or obligation, and, on the other, from legal presumption, is, in my humble opinion, clearly and correctly dealt with. The same result was reached in *Briggs* v. *Mitchell* (6), decided on March 16 in this year, in which in the leading judgment delivered by Lord Dundas there was, in my humble opinion, an equally correct

(1) (1906) 8 F. 438.
(2) (1908) 10 F. 762; 5 Sc. L. R. 559.
(3) 6 F. 992.
(4) (1904) 6 F. 822.
(5) [1910] A. C. 229.
(6) (1911) 48 Sc. L. R. 606; S. C. 705.

treatment of the principle and the law. These cases are in entire accord with the views set forth in the cases of the *Main Colliery Company* (1) and of *Hodgson* (2), both of which were decided in this House. Applying the statute itself and these decisions to the very simple facts of this case, I am of opinion that no conclusion is open to a Court of law administering the Act except that the conditions of liability there set out have not been met.

LORD ROBSON. My Lords, the question to be determined in this case is whether, on the admitted facts, there was evidence to justify the learned county court judge in finding that the applicant was wholly or partly dependent on the deceased. The facts are few and simple. The applicant had left her husband about twenty-two years before his death because of his alleged ill-treatment; she had since "lost sight of him," and had apparently given up all attempts to find him. After leaving him she had at first lived with her parents and worked in a factory. Then, about ten years before her husband's death, she became housekeeper to two miners and by her own efforts maintained herself in a way suitable to her condition in life.

The word "dependants," as defined by s. 13 of the Workmen's Compensation Act, includes all such members of the workman's family as were wholly or in part dependent on the earnings of the workman at the time of his death.

The learned county court judge has not said whether he found the "dependence" of this applicant on her husband's earnings to be total or partial, and the amount awarded, namely, 263*l.* 5*s.*, appears, upon the evidence as to the average wages of the deceased not to be conclusive as to either view. The award, however, has been treated by the Court of Appeal as one applicable to a partial dependency, and I will deal with it on that basis.

The position with regard to the applicant at the time of her husband's death was that she had long ceased to be dependent on him in fact, but of course she had not lost the legal right to maintenance at his hands, and might assert it if she chose. Under these circumstances it cannot be said in any fair and

(1) [1900] A. C. 358. (2) [1910] A. C. 229.

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reasonable sense that she was wholly dependent on him. She had by her own act, for reasons no doubt natural and sufficient to herself, rejected any such dependence. She had definitely declined the advantages, and, what is very important to be borne in mind, she had refused to perform the duties attaching to a dependent condition. She now seeks, as against her husband's employer, to be treated as though she stood in a relation to her husband which she had, as a matter of fact, completely abandoned so far as her husband was concerned.

It is easy to imagine circumstances in which the husband might make the performance of her duties so onerous and so dangerous to her safety or health that she would be driven to seek relief from their performance. The law does not leave her without a remedy in such a case. It may give her some relief from her duties to him, while holding him to his pecuniary obligations to her. And even where she has left her duties without securing by legal process a definite assertion of her continuing dependence on her husband's earnings, yet the circumstances may be such as to justify an arbitrator under the Workmen's Compensation Act in finding that her actual dependence is unaffected.

The arbitrator, of course, is not bound to constitute himself a tribunal to try the merits of domestic disputes and separations. All he has to do is to find whether or not there is, in fact, dependence on the husband in whole or in part at the time of his death. That single question of fact is all that concerns him, though the circumstances to be considered in arriving at the answer may be of infinite variety. The wife does not necessarily cease to be dependent on the husband simply because the latter refuses to recognize or perform his obligation and succeeds in throwing the burden of her maintenance for the time being on the wife's parents or friend, or on the State. They may fulfil the husband's duty for him, but the wife's legal dependence is still on him and not on them, and his death deprives her of the proper stay and support on which alone she is entitled to rely. The circumstances, however, are wholly different where the wife herself has for years clearly asserted and definitely maintained her complete independence of her husband. That is

what the applicant did in this case, but her doing so seems to have counted for nothing in deciding either the existence or the degree of her dependency.

In the case of a widow wholly dependent upon the deceased, the statute provides a measure of compensation which involves no inquiry into her exact pecuniary loss; but, in the case of one only partly dependent upon him, the compensation, while not exceeding the amount payable in cases of total dependency, is to be "proportionate to the injury to the said dependant." Although the learned county court judge is said to have treated the applicant as a partial dependant, no one invited him, and he did not attempt, to proportion the compensation to her actual injury or loss. The whole question seems to have been treated as one of law rather than fact, and she was regarded as being entitled to compensation solely because of the legal presumption of dependency attaching to her status as wife.

The money coming to a widow under the Act is not a present in consideration of her status; it is a payment by a third person to compensate her, as a dependant, for her actual pecuniary loss by her husband's death, and where her husband's death does not, in the circumstances of the particular case, involve any real detriment to her pecuniary position, there is no rule of law to prevent the arbitrator from finding that, though married to the deceased, the applicant was not in fact a dependant on him.

The judgments in favour of the applicant in the Court of Appeal were founded on the authority of certain decided cases. Without going over the ground traversed by my noble and learned friend Lord Atkinson, I will briefly refer to the facts in the principal of those cases.

In the case of *Coulthard* v. *Consett Iron Co.* (1) the husband had left the wife and had ceased to contribute to her maintenance, so that she was thrown on the charity of friends or the workhouse. The wife at the time of his death was expecting him back every day to provide a home.

In *Stanland* v. *North Eastern Steel Co., Ld.*, reported in note to *Williams* v. *Ocean Coal Co., Ld.* (2), the deceased had left the

(1) [1905] 2 K. B. 869. (2) [1907] 2 K. B. 425.

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applicant to look for work, but failed to return, and the applicant maintained herself and her children with occasional recourse to the workhouse.

In *Williams* v. *Ocean Coal Co., Ld.* (1) the husband left his wife in charge of his parents while he went to seek employment at sea. She afterwards went to her own parents. The husband found work as a miner, and though he did not give her a home, they had occasional intercourse, and there was nothing in the facts to suggest the conclusion that she had in any way given up her legal dependence upon him. In *Sneddon* v. *Addie* (2) the husband had deserted the wife, who was thereafter supported by her mother and the charity of her friends, being herself unable to work owing to bad health.

In each of these cases the widow was held, and, I think, rightly held, to be a dependant on the husband at the time of his death. The dependence of the wife continued after the separation from her husband, though other persons, namely, her parents, or friends, or the State, voluntarily and temporarily fulfilled the husband's obligation in his default. In such circumstances there was no adequate rebuttal of the presumption, or, as it may be better described, the probability, of dependency arising from her condition as a married woman, whereas in the present case it would scarcely be possible to have such a rebuttal more clearly established. I think, therefore, that this appeal should be allowed.

Order of the Court of Appeal reversed with costs here and below.

Lords' Journals, July 18, 1911.

Solicitors: *Bell, Brodrick & Gray, for Parker, Rhodes & Co., Rotherham; Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

(1) [1907] 2 K. B. 425.

(2) 6 F. 992.

[HOUSE OF LORDS.]

TAMWORTH COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

HALL . . . . . RESPONDENT.

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June 13.

Employer and Workman—Compensation—Dependant—Partial Dependency—Basis of Assessment—Claim by Parent—Earnings—Cost of Maintenance—Pecuniary Value of Services rendered by Deceased to Claimant—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 1 (*a*) (ii.).

The question how far a member of the family of a deceased workman was dependent on his earnings within the meaning of the Workmen's Compensation Act, 1906, is a question of fact to be determined by the county court judge upon a consideration of all the circumstances of the case.

Main Colliery Co. v. *Davies*, [1900] A. C. 358, explained.

Upon an application by a father, who claimed compensation under the Act on the footing of partial dependency in respect of the death of a son from an accident at the respondents' colliery, it appeared that the son, who lived at his father's house, assisted the father in his trade as a barber. The county court judge having found that the son's earnings at the colliery were not more than sufficient for the cost of his maintenance, and that consequently the father was not a dependant, the Court of Appeal set aside the award and remitted the matter to the county court judge to award compensation on the basis that he was not entitled to deduct from the son's earnings the cost of his maintenance:—

Held, that the county court judge was not precluded by law (1.) from deducting from the son's earnings the cost of his maintenance; (2.) from taking into account as against the cost of maintenance the pecuniary value of the services rendered by the son to the father in the latter's trade as a barber; and the cause was remitted to the county court judge with these instructions.

Osmond v. *Campbell & Harrison, Ld.*, [1905] 2 K. B. 852, if and so far as it holds that upon a question of partial dependency the county court judge is not entitled to deduct from the earnings of the deceased the cost of his maintenance, overruled.

APPEAL from an order of the Court of Appeal in England setting aside an award made by the judge of the Tamworth County Court under the Workmen's Compensation Act, 1906, and remitting the matter to the county court judge. (1)

The applicant was the father of a boy aged fourteen who died from the effects of an accident arising out of and in the course of his employment at the respondents' (the present appellants') colliery. He claimed compensation on behalf of

(1) [1911] 1 K. B. 341.

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himself and his wife on the footing of partial dependency. The respondents denied the dependency. The family consisted of the applicant and his wife and several children. All the family lived at home except one son who was in the workhouse infirmary and for whom the father paid 1*s.* 6*d.* a week. The father earned in the daytime at the colliery 16*s.* 9*d.* a week, and he also carried on a barber's business on Monday, Wednesday, and Friday evenings and three-quarters of a day on Saturdays. From this business he received 13*s.* a week. The deceased son earned 6*s.* 11*d.* a week at the colliery and he paid the whole of his earnings to the father. This sum was admitted to be not more than sufficient to pay for his maintenance. He also helped his father in the barber's business, being able to lather, shave, and cut hair. Upon the death of the deceased the father had to employ a boy at 2*s.* a week in the barber's business. This boy could not shave or cut hair. According to the evidence of the father, the receipts of the business dropped from 13*s.* to 9*s.* a week, and, taking into account the 2*s.* which he had to pay the boy, he estimated the loss to the business consequent on the death of the deceased at 6*s.* a week. The father paid the deceased 1*s.* a week pocket money. Of the remaining members of the family another son earned 8*s.* a week, which he paid to his father; the wife and other children earned nothing.

The county court judge found that the wages earned by the deceased at the colliery were not more than sufficient to pay for his keep, and that he earned nothing else, and he therefore found that the applicant was not a dependant; but by consent he ordered that the respondents should pay 10*l.* for burial expenses.

The Court of Appeal (Farwell L.J. dissenting) set aside the award and remitted the matter to the county court judge to award such sum as he might consider reasonable and proportionate to the injury to the applicant without having regard to the amount which the maintenance of the deceased would have cost.

The employers appealed.

C. A. Russell, K.C., and *Edward Cave*, for the appellants. 1. The question of dependency is a question of fact for the county court judge: *Main Colliery Co.* v. *Davies* (1); *Hodgson*

(1) [1900] A. C. 358.

v. *West Stanley Colliery.* (1) The county court judge found that there was here no dependency. Whether right or wrong that was a finding of fact and not a conclusion of law, and there being evidence to support it there is no appeal from that finding. The judgments of the Master of the Rolls and Fletcher Moulton L.J. are founded upon a misapprehension of the decision of this House in *Main Colliery Co.* v. *Davies.* (2) They seem to have read Lord Halsbury's judgment as meaning that as soon as it was proved that the boy handed over his wages to his father dependency was established. But if the whole of the judgment is looked at it is clear that Lord Halsbury regarded dependency as a mere question of fact in each case. They also felt themselves bound by *Osmond* v. *Campbell & Harrison, Ld.* (3) to hold that the cost of the maintenance of the deceased could not be taken into account. So far as the decision is concerned that case does not hurt the appellants, but there are dicta of Collins M.R. which may bear the meaning that no deduction ought to be made for the cost of the keep of the deceased workman. If, as the majority of the Court of Appeal thought, that was the ratio decidendi of the case, it is wrong and is contrary to the language of the Act of Parliament, which says that in cases of partial dependency the amount of compensation is to be "reasonable and proportionate to the injury to the said dependants": Sched. I., par. 1 (*a*) (ii).

2. On the question whether the value of the services rendered by the deceased to his father ought to be taken into account, upon the construction of the Act "dependency" means dependency on earnings, and the right of the dependant is to be compensated in respect of the earnings or portion of earnings of the deceased of which he has been deprived. The Act contains no reference to services rendered; it makes earnings the measure of compensation, and though, as a matter of fact, the position is different when the alleged dependant has been receiving services of value from the deceased, that is not a loss for which the Act provides. This is not a question of damages for a wrong, but of compensation under the Act. The county court judge did not apply his mind to the question whether apart from the question

(1) [1910] A. C. 229. (2) [1900] A. C. 358.
(3) [1905] 2 K. B. 852.

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of earnings regard should be had to the pecuniary value of the services rendered by the son to the father at the barber's shop. There is no ground for holding that the county court judge misdirected himself on any question of law.

Hugo Young, K.C., and *H. H. Joy*, for the respondent. 1. The county court judge in estimating the cost of maintenance misdirected himself in rigidly excluding from consideration the lessening of the burden of the son's keep by the services rendered by him to his father in the latter's trade as a barber. The respondent is not contending that those services can be treated as earnings, because, being services rendered by the son to the family, s. 13 of the Act shews that they cannot be so treated. The county court judge took the view that if the value of these services could be treated as earnings he could take it into account, but that otherwise he could not. He was not suggesting that the services were valueless, but he held as a matter of law that they ought to be left out of consideration altogether. But his duty was to look at all the facts to see what was the actual burden of the son's keep to the father and how much profit the father derived from having his son at home. If the burden of the keep is reduced by something brought in from other sources the judge ought not to shut his eyes to that. He must look at the whole family budget. This point is fully dealt with by Fletcher Moulton L.J. in his judgment.

2. If the decision of Collins M.R. in *Osmond* v. *Campbell & Harrison, Ld.* (1) stands, it is an authority for the proposition that the county court judge ought not to have taken into consideration the cost of maintenance at all.

C. A. Russell, K.C., replied.

LORD LOREBURN L.C. My Lords, in this case there was a difference of opinion in the Court of Appeal and the majority of the Court thought themselves bound by authority. The question is a question of fact: was this father partially dependent upon his son? And that was for the county court judge to determine upon the evidence. The authority in question, namely, *Main Colliery Co.* v. *Davies* (2), was apparently regarded as though it decided that a father must be dependent

(1) [1905] 2 K. B. 852. (2) [1900] A. C. 358.

upon his son in certain circumstances. That case only decided that a parent may be dependent upon his son's earnings.

In my opinion it is not right to say that the county court judge must exclude the cost of the maintenance of the son. He is quite entitled to say that the father is not dependent at all because he is not in a situation to gain anything from the earnings of the son. The learned county court judge would be entitled to say if he thought it were a fact that the earnings of the son were 6*s.* 11*d.* and that he cost his father at least 6*s.* 11*d.* to keep. If *Osmond* v. *Campbell & Harrison, Ld.* (1), to which reference was made, means anything contrary to this, then I dissent from it. Accordingly, if this were the only point, I should say that the county court judge was entitled to find that there was no dependency at all, inasmuch as the cost of the maintenance of the son was as much as the wages which he gave to the father.

But another point was referred to by Fletcher Moulton L.J. and was fully argued on the part of the applicant in the Court of Appeal. The boy earned 6*s.* 11*d.* a week. Was the county court judge obliged to set against that the 6*s.* 11*d.* which his maintenance cost? That may depend upon the facts. If the boy was giving to his father services of value, that was a matter which in my opinion the county court judge was entitled to take into consideration, because the value of the services may have been the equivalent of the maintenance, and ought in his view perhaps to be set against it. There is no rule of law that I know of to prevent the county court judge from looking at the whole of the facts, and there is no rule of law which says that the county court judge must so marshal the receipts and the outgoings as to set off the whole of the maintenance against the earnings and so negative the fact of dependency. He may say, if he thinks right and thinks it is the truth, that though the earnings were 6*s.* 11*d.* and the maintenance was 6*s.* 11*d.*, yet in return for the maintenance the deceased did service of value, so that the earnings were a clear gain, and that the applicant was dependent upon the earnings to the full extent or to any qualified extent. The proper course is to look at all the circumstances and to say to what extent, if at all, was the father dependent upon his son's earnings.

(1) [1905] 2 K. B. 852.

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Lord Loreburn L.C.

Accordingly I cannot agree with the form of the order made by the Court of Appeal, but I agree that the case ought to be remitted to the county court judge simply that he may hear it and decide it. And I think he ought to understand from this House that in determining the question of the dependency of the father on the earnings of his son he is not precluded by law from making a deduction in respect of the cost of maintenance, and that he is not precluded by law from taking into account as against the cost of the son's maintenance the pecuniary value, if any, of the services rendered by the son to the father in the conduct of the latter's business as a barber.

LORD ATKINSON. My Lords, I concur.

LORD GORELL. My Lords, I also concur.

LORD ROBSON. My Lords, I agree.

Order of the Court of Appeal varied by striking out the words "without having regard to the amount which the maintenance of the deceased would have cost" and certain provisions as to costs and subject to the said variation affirmed. The cause to be remitted to the county court judge with an instruction that in determining the question of the alleged partial dependency of the father on the earnings of the son he is not precluded by law from making a deduction in respect of the son's maintenance, nor is he precluded by law from taking into account, as against the cost of the son's maintenance, the pecuniary value, if any, of the services rendered by the son to the father in the latter's business as a barber; the appellants to pay to the respondent the costs in the Courts below and the costs of the appeal.

Lords' Journals, June 13, 1911.

Solicitors for appellants: *Ullithorne Currey & Co., for C. F. Elliot Smith, Mansfield.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Hughes & Masser, Coventry.*

[HOUSE OF LORDS.]

FLETCHER AND OTHERS (PAUPERS) . . . . APPELLANTS; H. L. (E.)
1911
AND
OWNERS OF SHIP DUCHESS . . . . . RESPONDENTS. *June* 15.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Seaman—Return to Ship—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The master of a ship, which was lying in Bangor Roads owing to stress of weather during a trading voyage from Liverpool to Penmaenmawr and back, went on shore in the evening and, after staying at a hotel for an hour, returned to the pier and hailed his ship to send a boat. Before the boat reached him he fell off the pier and was drowned. It was not proved that he went ashore on the ship's business, but it was proved that he had a right to be on shore. His dependants claimed compensation under the Workmen's Compensation Act, 1906:—

Held, that the accident did not arise out of the deceased's employment.

APPEAL from an order of the Court of Appeal in England setting aside an award made under the Workmen's Compensation Act, 1906, in favour of the appellants by the county court judge of Flintshire. (1)

The appellant Ann Fletcher, the wife of William Fletcher, was until recently the widow of Thomas Hewitt, who at the time of his death was master of the respondents' steamship *Duchess*. The other appellants were infant children of her marriage with the deceased. The appellants claimed compensation as dependants in respect of Hewitt's death, and the only question at issue between the parties was whether the death was caused by an accident arising out of and in the course of the deceased's employment with the respondents. On December 28, 1908, the vessel left Liverpool for Penmaenmawr to load stone. Owing to the weather she was unable to load, and ran to Bangor Roads, where she lay for the night. On December 29 she returned to Penmaenmawr, and was again unable to load and again went back to Bangor for the night. The county court

(1) [1910] 1 K. B. 772.

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judge found that by the terms of their employment the master and crew had to find their own food and were entitled to go ashore for food when the supply was exhausted; that they expected to return to Liverpool the same day with their cargo of stone and were short of food by the evening of the first day; that the master's duties to the owners when his ship was lying to off the pier might take him to the pier and might involve his being as much on the pier as on the ship.

On the night of December 29, about 8 P.M., the deceased went on shore from his ship in a boat and went to a hotel about one hundred yards from the pier. He returned to the pier about 10 P.M. and hailed his ship for a boat, but for a long time he was unable to attract the attention of those on board. It was a dark night. About 11 P.M. a boat was sent from the ship, and before the boat reached the pier the deceased fell into the water and was drowned. The county court judge came to the conclusion upon the evidence that the dependants had failed to discharge the onus which lay upon them of proving affirmatively that the deceased went to the hotel for purposes connected with his duties as master, but he was further of opinion that, though there might have been a deviation in going from the pier to the hotel, that deviation, to use the language of Lord Atkinson in *Low* v. *General Steam Fishing Co.* (1), was at an end when he returned to the pier, and that at the time of the accident the deceased had a right to be at the place in which he actually was. He therefore made an award in favour of the applicants. The Court of Appeal set aside the award on the ground that there was no evidence that the accident arose out of the employment.

Greer, K.C., and *Clement Davies*, for the appellants. The question is whether this case falls within *Moore* v. *Manchester Liners, Ld.* (2) or within *Kitchenham* v. *Owners of S.S. Johannesburg.* (3) The appellants admit that there is no sufficient evidence that the deceased went on shore for purposes of his employers, but, whether he went on shore on his employers' business or not, he had a right to go on shore, and, that being so,

(1) [1909] A. C. 523.
(2) [1910] A. C. 498.
(3) [1911] 1 K. B. 523; on appeal, ante, p. 417).

he was there in the course of his employment, because his employment was continuous. That is established by *Moore* v. *Manchester Liners, Ld.* (1) Then the question is whether the death arose out of his employment, and it arises out of his employment if it results from a risk to which his employment peculiarly subjects him. The risk of a sailor falling into a dock when properly and rightly returning to his duty is a risk to which his employment renders him peculiarly liable. Here it is established that the deceased had taken the first step towards getting on to the ship. He had hailed a boat from his ship, and while waiting for the boat fell into the water. The question does not turn upon whether he is using a mode of access provided by the ship: per Fletcher Moulton L.J. in *Kitchenham* v. *Owners of S.S. Johannesburg.* (2) The appellants do not now rely on *Low* v. *General Steam Fishing Co.* (3), upon which the county court judge founded his decision, because there in the opinion of the majority of the House the man had duties to perform on the quay. Here the special risk of the man's employment as a sailor commenced when he approached the water, when he was on the pier, and therefore the accident arose out of as well as in the course of his employment.

Atkin, K.C., and *Alexander Neilson*, for the respondents, were not called upon to argue.

LORD LOREBURN L.C. My Lords, the point argued before your Lordships in this case was that this accident, which proved fatal to the unfortunate master of the ship, arose out of his employment. He fell from the quay into the water when waiting to return to his ship. It was not established that he had to go ashore on the ship's business.

I think that the risk from which he perished was not one specially connected with his employment, such as may be the risk of crossing a plank or gangway leading to the ship or of going in a boat to the ship. Under those circumstances I think that the conclusion at which the Court of Appeal arrived was right, and that this appeal ought to be dismissed.

(1) [1910] A. C. 498. (2) [1911] 1 K. B. 523, at p. 527.
(3) [1909] A. C. 523.

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LORD ATKINSON. My Lords, I concur.

LORD GORELL. My Lords, I also concur.

LORD ROBSON. My Lords, I concur.

Appeal dismissed.

Lords' Journals, June 15, 1911.

Solicitors for appellants: *Bower, Cotton & Bower, for Hughes & Hughes, Flint.*

Solicitors for respondents: *Botterell & Roche, for J. R. L. Muspratt, Flint.*

[HOUSE OF LORDS.]

H. L. (E.) 1911 *July* 21.

RICHARD EVANS & CO., LIMITED . . . APPELLANTS;

AND

ASTLEY . . . . . RESPONDENT.

Employer and Workman—Compensation—Accident arising out of and in the Course of the Employment—Fatal Accident—Evidence—Inference—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A train consisting of an engine and three trucks, which were being pushed by the engine, was in charge of a brakesman, who was riding in the foremost truck. This train overtook another train travelling in the same direction, which consisted of an engine and brakes van, the engine being in front. The two trains proceeded buffer to buffer but were not coupled. After they had passed one set of points, which had been operated by the brakesman in the brakes van, and while they were on the way to another set of points a quarter of a mile off, the brakesman in the truck attempted to climb out of the truck into the brakes van ahead, and while doing so fell and was killed. The trains would have had to pass over the second set of points and then stop, and one of the brakesmen would have had to alight and raise a lever to allow the trains to pass back over the points in the reverse direction on to a branch line. The brakes van was furnished with a step, whereas the truck had none. The railway and trains were the property of a colliery company whose servants the men were. The widow of the deceased man claimed compensation under the Workmen's Compensation Act, 1906:—

Held (Lord Atkinson dissenting), that there was evidence from which

the arbitrator could infer that the deceased was trying to climb into the brakes van with a view to alighting therefrom by the step for the purpose of attending to the points as the train was passing, and that the accident arose out of as well as in the course of the employment.

EMPLOYERS' appeal from an order of the Court of Appeal in England affirming an award made by the county court judge of Lancashire in favour of the respondent (the applicant) under the Workmen's Compensation Act, 1906. (1)

The respondent was the widow of Robert Astley, a brakesman in the employment of the appellants, who were colliery proprietors and owned as part of their undertaking a line of railway. The widow on behalf of herself and her two infant children applied for an arbitration to determine the liability of the appellants to pay compensation in respect of the death of her husband. The only question upon the arbitration was whether the deceased died from an accident arising out of his employment.

On September 24, 1910, the deceased was in charge of a train of the appellants travelling on the appellants' line. The train consisted of an engine and three trucks. The engine was in the rear of the trucks and was pushing them. The deceased was riding in the foremost truck. The driver and fireman of the train, as regards shunting operations, were under the orders of the deceased. Shortly before reaching certain points at Wood Pit this train overtook another train of the appellants travelling in the same direction and on the same line. The latter train consisted of an engine and a brakes van, the engine being in front. Both trains were on their way to the appellants' shed. The two trains proceeded buffer to buffer until they approached the Wood Pit points. They then stopped, and the brakesman belonging to the leading train descended from his van and opened the points for the two trains to pass through. After they had passed the points the brakesman rejoined his train and the two trains proceeded buffer to buffer as before; they were not coupled in any way. The trains were travelling at about eight miles an hour towards another set of points which would be reached in two or three minutes. They would have to pass over these points and come to a standstill. Then one of the

(1) [1911] 1 K. B. 1036.

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brakesmen would have to alight and work a lever in order that the trains might come back through the points in the reverse direction on to a branch line leading to the shed. When the trains had travelled about eighty yards beyond the Wood Pit points the deceased climbed out of the truck in which he was riding on to the buffer of the truck and thence on to the buffer of the brakes van; and he then attempted to climb over the ledging of the brakes van, which was 3 feet 6 inches in height above the buffers, and while doing so fell on to the line and sustained injuries from which he died on the following day. The most important witness was the engine driver of the train of which the deceased was in charge, who was called by the employers. He stated that there was no necessity for the brakesman to alight while the train was travelling. He did not know what the intentions of the deceased were in getting out of the waggon into the brakes van. The deceased had never done such a thing before, and he (the witness) was unable to suggest any reason for his doing it. There was a notice in the cabin forbidding men to get on the trains in motion. At the time of the accident the other brakesman was putting on his coat and seemed to be taking his tea with his back to the door of the van. There were steps on the side of the van, the bottom footboard being 18 inches from the ground. There were no steps to the truck, the distance from the buffer to the ground being 3 feet or 3 feet 6 inches.

From these facts the county court judge drew the inference that the deceased, when he met with the accident, was preparing to get down from his truck to attend to the points by the very dangerous way of first getting on to the brakes van ahead, where he would have steps to the ground, when the proper time arrived for him to alight. He accordingly made an award in favour of the widow, and this award was affirmed by the Court of Appeal (Buckley L.J. dissenting).

June 16. *Rigby Swift* and *G. C. Rees*, for the appellants. There is no evidence to support the finding of the county court judge. It was no part of the deceased man's employment to leave his train and embark upon another train for the purpose, taking the view most favourable to him, of making his employment easier. At

the time of the accident he was doing something outside the sphere of his employment, and if outside the sphere of his employment it matters not that he might have done it for the benefit of his employers. The accident arose from a peril which the man himself introduced into the employment and which was in no way incidental to the employment and could not have been in the contemplation of the parties. There is not a particle of evidence that at the time of the accident the man was doing his employers' business. Such evidence as there is is the other way. Buckley L.J.'s judgment expresses the appellants' argument. The inference drawn by the county court judge as to the man's intention in climbing into the brakes van is surmise only; but to justify such an inference there must be some data from which it could be reasonably drawn: *Marshall* v. *Owners of Steamship Wild Rose*. (1) It is consistent with the evidence that the man might have meant to climb into the brakes van for his own pleasure, as in *Reed* v. *Great Western Ry. Co.* (2) If a man chooses to go to a dangerous place where he has no business to go, incurring a danger of his own choosing and one beyond any reasonable exercise of his employment, and meets with an accident, the accident cannot be said to arise out of his employment: *Brice* v. *Edward Lloyd, Ld.* (3)

Stewart-Brown and *Alfred Elias*, for the respondent. If there is any evidence at all to justify the inference of the county court judge his finding is conclusive. The test is whether if this case were being tried before a judge and jury it could have been properly withdrawn from the jury. If a man is doing his employer's business but is doing it in the wrong way—if he is doing it carelessly, rashly, and negligently—that does not prevent the accident arising out of and in the course of the employment: *McNicholas* v. *Dawson & Son* (4); and that is the reasonable conclusion to be drawn from the facts of this case.

Rigby Swift, in reply, cited *Wakelin* v. *London and South Western Ry. Co.* (5)

The House took time to consider.

(1) [1910] A. C. 486.
(2) [1909] A. C. 31.
(3) [1909] 2 K. B. 804, at p. 810.
(4) [1899] 1 Q. B. 773, at p. 777.
(5) (1886) 12 App. Cas. 41.

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July 21. EARL LOREBURN L.C. My Lords, I agree with the majority in the Court of Appeal, though I must always hesitate in differing from the weighty opinion of Buckley L.J.

Your Lordships have to decide whether there was any evidence upon which the learned county court judge might reasonably come to the conclusion that the deceased man was trying to climb from the waggon on to the brakes van, with a view to using the step with which the van was furnished, and so alighting while the train was slowly passing the points.

It is, of course, impossible to lay down in words any scale or standard by which you can measure the degree of proof which will suffice to support a particular conclusion of fact. The applicant must prove his case. This does not mean that he must demonstrate his case. If the more probable conclusion is that for which he contends, and there is anything pointing to it, then there is evidence for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but Courts, like individuals, habitually act upon a balance of probabilities.

In the present case, the theory that this man climbed upon the van, or tried to do so, for his own purposes, whether to gossip with the other brakesman or to amuse himself, seems to me most improbable. The theory that he meant to get upon the van because in a couple of minutes the train would be passing the points, and he had to arrange the points and would save time by alighting where the points were, and could conveniently do so by using the steps which were on the brakes van, whereas there were none on the truck, seems to me very probable. The facts, being as I have just stated, point to it, and the only matter in question being the intention of the unfortunate man, I confess that I have no real doubt that this was just what he intended. The county court judge so found, and in my judgment was entitled so to find.

If that be so, the award must be sustained. This man was killed from a risk in its nature incidental to his kind of employment while doing his master's work, though in a most careless and dangerous manner. It was indeed argued here, for the first time I rather think, that in going from the truck to the van he quitted his employment, and that he was not employed to do

what he did. The answer is that he was all the time doing what he was employed to do, though in the wrong way.

LORD ATKINSON. My Lords, I regret that I am unable to concur in the judgment just delivered by my noble and learned friend upon the woolsack. I think there was no evidence in the case from which an inference could reasonably be drawn that the accident by which the deceased met his death arose out of and in the course of his employment. It has been decided by your Lordships' House, the English Court of Appeal, and other tribunals, first, that in claims under the Workmen's Compensation Act the burden of proving that the accident causing the injury to, or death of, the workman arose out of and in the course of his employment, lies upon the applicant or plaintiff; and second, that the arbitrator, or county court judge, is the absolute judge of fact, and that, therefore, his findings of fact cannot be disturbed (in the absence of misdirection in point of law by himself of himself) unless the evidence be such that no reasonable men, or no reasonable man, properly instructed, could arrive at the conclusion at which he has arrived. One not infrequently finds, in cases under this Act, surmises more or less shrewd of this arbitrator or judge, or conjectures more or less plausible, described as inferences of fact, although there are no data whatever from which the so-called inferences can reasonably be drawn.

In my view the present is a case of that description. Lord Watson pointed out this distinction in the clearest language in *Wakelin* v. *London and South Western Ry. Co.* (1) There the husband of the plaintiff was found dead on the defendants' line at a level crossing. The defendants' train did not whistle as it approached the crossing, and there was some evidence that the company managed the crossing negligently, but there was no evidence whatever from which it could, as a matter of fact, be reasonably concluded whether those in charge of the train negligently ran down the man, or the man negligently ran against the train, though, if one were permitted to speculate, one might quite naturally conclude that, owing to the absence of whistling and the other negligent acts claimed to

(1) 12 App. Cas. 41.

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have been proved, it was more probable that the engine, through negligence, ran down the man than that the man negligently ran against the engine.

The jury adopted the apparently most probable alternative, and found for the plaintiff in the action, but it was held by the Court of Appeal and by your Lordships' House that they were wrong, and that there was no evidence to justify their finding. The passage in Lord Watson's judgment, as reported in the *Law Reports* (1), runs as follows: "The evidence appears to me to shew that the injuries which caused the death of Henry Wakelin were occasioned by contact with an engine of a train belonging to the respondents, and I am willing to assume, though by no means satisfied, that it has been proved that they were, in certain respects, negligent. The evidence goes no further. It affords ample material for conjecturing that the death may possibly have been caused by that negligence, but it furnishes no data from which an inference can be reasonably drawn that as a matter of fact it was so occasioned."

The conclusions upon which the award of the county court judge and, with all respect, the judgments of the majority of the Court of Appeal appear to me to be based are in truth, in my view, conjectures of the character indicated by Lord Watson, not reasonable inferences of fact drawn from established data.

The first of these conjectures is set forth by the county court judge in these words: "I draw the inference from what occurred that the deceased, when he met with the accident, was preparing to get down from his engine" (I presume he means truck) "to attend to the points by the very dangerous way of first getting on the brakes van ahead where he would have steps to the ground when the proper time arrived for him to alight." I shall refer presently to what, according to the terms of his employment, was "the proper time" for him to alight.

The second and third conjectures are set forth in the judgment of the Master of the Rolls, namely, first, that the brakesman in the front train did not intend to get out of his van to move the lever at the points they were approaching, since he had done so at those which they had already passed over, and second,—I use

(1) 12 App. Cas. at p. 49.

his own words,—that "it was the business of the deceased, according to the custom and courtesy as between brakesmen on these occasions, to get down and to work the lever in order that the two trains might go back into the siding."

The fourth conjecture, very similar to the third, is set forth in the judgment of Fletcher Moulton L.J. in these words: "I come to the conclusion that, as the other brakesman had opened the points because in passing through those points his train was leading, it would probably be the business of Astley to open the points which they were going to pass through when his train would be leading." I have extracted these passages from the authorized reports, because I presume the judgments have been revised by the learned Lords Justices, and not from the report of their judgments printed in the *Law Times* (1), which I presume has not been so revised.

Now, if one examines the evidence to discover the data from which these conclusions, claimed to be inferences of fact, are said to have been drawn, it will be found that the deceased, whose age is not stated, had been for four years in the appellants' employment. He had acted as brakesman (which, I presume, means a man who controls and works a brake) with William Fairhurst, an engine driver, who had been in the appellants' employment for eight months before the accident. On the occasion of the accident the train of which he was the brakesman was composed of an engine and three trucks. Deceased was in the truck farthest from the engine, a six-ton waggon. Fairhurst, the engine driver, was under the control of the deceased. The engine was engaged in pushing, not pulling, the trucks into the company's shed over two sets of points. The waggon in which the deceased was being carried was therefore in front.

In the regular course the train, if proceeding alone, would, after passing over the points, stop, and it would be the duty of the deceased, as brakesman, to have descended from his truck and raised the lever, in order that the train might come back over the points. It was not necessary for the brakesman to get off the train while it was in motion.

There is not a particle of evidence to shew that he ever had

(1) And referred to in argument.

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done so, or that it was the custom or practice to do so; and it was proved that there was a notice in the cabin that men should not get on trains when moving. The buffer of the waggon in which he travelled was 3 feet from the ground. The step of the brakes van, hereafter referred to, was only 18 inches from the ground, the difference between their respective heights was thus only 18 inches. There is not a particle of evidence in the case to the effect that on any occasion the deceased had experienced any difficulty whatever in descending from any waggon in which he was engaged, or ever evinced any desire to get a foothold, step, or platform nearer the ground than the wheel or buffer of his waggon from which to descend, or any desire to descend from his waggon while it was in motion; but, according to the finding of the county court judge, he was seized on this occasion with a strong desire, which he is not proved to have ever manifested before, to do both these things, namely, to descend, while his waggon was moving, and to obtain a platform 18 inches lower than the wheel or buffer of his waggon from which to descend—so strong a desire, indeed, that to gratify it he attempted to do the dangerous and reckless thing which cost him his life. In the progress of this train towards the shed it overtook, near the points close to a place called Wood Pit, an engine and brakes van, also belonging to the appellants, proceeding in the same direction, engine in front. The two trains came into touch, buffer to buffer, but were not coupled. As they reached Wood Pit the trains stopped; the man in the brakes van got down, held the points' lever until the two trains passed over them, and then got into his van again. The trains accordingly proceeded on their route for sixty or seventy yards, they were then travelling at about seven or eight miles an hour, and were about a quarter of a mile distant from the points which they were approaching. Just as the brakesman in the brakes van had put on his coat and was about to take his tea, the unfortunate deceased sought to clamber from his waggon into the brakes van, passing over the ledging of the van, which was 3 feet 6 inches higher than the buffer of his waggon. He fell and was killed.

It is suggested by the Master of the Rolls that, according to the "custom and courtesy" amongst brakesmen as I understand

him, it would be the duty of the deceased to work the switch lever at the points they were approaching, either because the other brakesman had done it at the Wood Pit points, or because the train of the deceased would be the leading train when coming out again over the points. But there is not a suggestion of anything of the kind in the evidence, and besides, if there was such a custom or practice, and if the deceased had this desire to conform to it, it appears to me impossible to explain why he did not mount into the brakes van at Wood Pit points when the trains were stationary, but should have waited till they had proceeded sixty or seventy yards upon their journey and were travelling seven or eight miles per hour. The driver Fairhurst stated that the deceased had no reason to get out of his waggon for anything connected with the train. The brakesman into whose van he went was not examined, and none of the witnesses who were examined suggest that the deceased, up to the attempted transit, ever indicated an intention or desire to do what is attributed to him. No explanation of his action is given by them. One would think that if this "custom and courtesy" amongst brakesmen existed the engine driver must have known something about it. The last conjecture appears to me to be the most baseless of all, namely, that the brakesman, by putting on his coat and taking his tea, gave notice, or announced, to the deceased that he, the vanman, did not intend to work the lever of the points a quarter of a mile ahead and that therefore the deceased should do it.

The surmise that he went into the van to share the tea or to gossip with the vanman is, as appears to me, quite as plausible as that he went into it to work the lever at the points they were approaching.

My Lords, I have gone through the evidence thus minutely because of my unfeigned respect for the learned Lords Justices who formed the majority of the Court of Appeal from whom I differ. I think that there was no evidence sufficient to sustain the conclusion to which they and the county court judge came; that these conclusions are in truth mere conjectures, or surmises for which this case, no doubt, like that of Wakelin, may afford ample material, but are not at all inferences of fact reasonably drawn

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from sufficient data. In my opinion the judgment of Buckley L.J. was clearly right, and that of the Court of Appeal erroneous. The appeal, I think, should therefore be allowed with costs.

I wish further to state that, in my opinion, it was the bounden duty of the deceased, who was in charge of the train, to remain upon it; that he abandoned his post of duty in leaving it; and, though it is not necessary for the purposes of this case to decide the question, I wish to point out that if a workman be employed to do a certain thing, and a place be assigned for him in which to do it, and he chooses to attempt to do the same thing in a wholly different, unauthorized, and a much more dangerous place, thereby exposing himself to a risk not incidental to the reasonable discharge of his duties, and is injured by an accident arising from this added risk, it by no means follows that the injury he sustains should be treated as arising out of and in the course of his employment.

For instance, if one should employ a carpenter to saw timber and make doors, and assigned to him a workshop in which to carry on this work, but if, instead of doing the work inside the workshop, he should attempt to do it on the roof of the building, and fell, and was injured, it does not appear to me, as at present advised, that the accident, due to a new risk added by the workman's own rashness, could be held to be an accident arising out of or in the course of his employment. The workman, in such a case, by his own act, in effect, I think, changes the whole nature and character of the employment. He makes it something quite different from that contemplated by his contract of service. And his conduct is, in my mind, generically different from the mere doing of the thing he is employed to do in the place appointed, carelessly or negligently, for he goes into a dangerous place which he was not employed to be in, and had no right to be in. So that even if it were established in this case, which I think it is not, that Astley's object in scrambling into the van was to enable him to descend more easily while the train was in motion with a view to open the points, I should still be inclined to doubt whether the injury he received arose out of or in the course of his employment.

I further especially desire to guard myself against being

supposed to concur in that portion of the judgment of Fletcher Moulton L.J. (1), in which he states what, in his opinion, is the principle which ought to be applied to the presumption which he considers arises in the case of the death of a workman due to the dangers of his employment.

LORD GORELL. My Lords, the question in this case, which has been very fully argued before your Lordships, is whether the accident in question arose out of the deceased man's employment. And the answer to this question depends on whether there was any evidence which justified the county court judge in drawing the inference from what occurred "that the deceased, when he met with the accident, was preparing to get down from his engine to attend to the points by the very dangerous way of first getting on to the brakes van ahead where he could have steps to the ground when the proper time arrived for him to alight." On the one side it is said that there was evidence from which this inference might reasonably be drawn, and on the other that there was no evidence to support it, but that the matter rested only in surmise.

Astley, the deceased, was brakesman on a train consisting of an engine and three trucks, and was in charge of the train. The trucks were being pushed by the engine, and Astley was in the front truck. From the evidence it would seem that the truck was an open truck with no steps down from it, and not a brakes van, and, as far as I understand, he had not, when in the truck, anything to do with braking, but had to give orders to the driver and fireman, and to get down to change the points when necessary.

It also appears that the train was making for the company's shed, where, presumably, duties with regard to moving the train would end, or end for a time. The train overtook another train with an engine in front, and a brakes van behind which had steps by which to get down from it, and the two trains travelled buffer to buffer but not coupled. At points at Wood Pit the trains stopped, the brakesman in the front train got down, opened the points and held them open till both trains passed, and then got into his van again. He proceeded to put on his coat, get his can, and take his tea. The train proceeded in the direction of some

(1) [1911] 1 K. B. at p. 1044.

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further points some quarter of a mile on, where the trains would have to stop, and the points would have to be opened and kept open while the trains were shunted back on to the branch leading to the shed. As the trains were thus proceeding, and before they had reached these other points and stopped, the deceased attempted to get into the brakes van in front of him, but fell and was killed.

To open the points one of the men would have to get down. The brakesman in the front van was acting as if he did not intend to do so. The fireman, who attended on subpœna, does not express any opinion as to what Astley's object was in getting out of his truck, and the engine driver, who was a witness for the appellants, could suggest no reason for his doing so. The brakesman, who might have thrown more light on the matter than any one else, was not called by either side. The account of the accident is somewhat meagre; but when it is remembered that one of the men had to get down; that the other man did not seem to be preparing to do so, but the contrary; that it was easier to get down, especially if the trains were still moving, by the steps of the brakes van, which came down to 18 inches off the ground, than off the truck, which had no steps and the buffers of which were 3 feet from the ground; that to jump down opposite the points as the trains passed and to open the points after the trains had passed and were about to come back may be easily done, and that as the trains were going to the shed there could be no possible object in getting out of the truck into the van for a momentary chat, it seems to me that it is most reasonable to infer that Astley, having nothing to keep him in his truck, did not intend to abandon his post and did not in fact abandon it, but was doing what he did in order to be ready to work the points, and that this is not a matter of mere surmise or of an inference which can reasonably be drawn either way, but that the county court judge had evidence upon which he could reasonably draw the inference which he did.

I am therefore of opinion that the judgment of the Court of Appeal should be affirmed.

LORD ROBSON. My Lords, there is no doubt that the deceased workman in this case met his death by accident while in the

course of his employment, and the only question is whether there is evidence justifying the conclusion that the accident "arose out of" his employment. His work at the time was that of a brakesman. The train upon which he was placed consisted of two parts which were running together as one train, although not coupled, and upon the other part of the train there was another brakesman, who, just before the accident, was apparently intent on his tea. The train was approaching a set of points, where it would be necessary for one or other of the two brakesmen to get down from the train and work the lever. The deceased was seen to get out of his truck in order to get into the brakes van, from which descent and ascent were rather easier than they were from his own truck, especially if the train were moving. In thus changing his position he slipped, and was killed.

It is contended by the appellants that in this state of the facts there is nothing to shew that he was doing his master's work at the time of his death. They say that the facts are consistent with his having left his work for his own pleasure or purposes. What precise intention he had in his mind is, of course, not now susceptible of direct proof, and the Court must look at all the circumstances to see if they give rise to a reasonable and definite inference on the matter in question. If they give rise to conflicting inferences of equal degrees of probability, so that the choice between them is mere matter of conjecture, then the applicant has failed to prove her case. But is that shewn to be the case here? On the one hand it is said that climbing from one truck into another is not, prima facie, a matter of pleasure and was a manœuvre which, if safely performed, would have facilitated the next piece of work he had to do or may probably have intended to do. On the other hand the appellants say, and it is of course possible, that the deceased may have been getting into the brakes van in order to leave his proper duty and waste his time in the society of the other brakesman. That, however, would have been a wrongful intention on his part, and, as such, it is not lightly to be presumed against him.

When a workman is killed in the course of his employment while engaged in some act reasonably consistent with his

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master's service, I think it requires some more definite evidence than the appellants can suggest in this case in order to found the inference that he was moved by a wrongful intention. In these circumstances I think the inference drawn by the county court judge was the only inference properly open to him, and that this appeal fails.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 21, 1911.

Solicitors for appellants: *W. Pingree Ellen, for Peace & Darlington, Liverpool.*

Solicitor for respondent: *H. Verdon Baines, for A. E. B. Griffin, St. Helens, Lancashire.*

[HOUSE OF LORDS.]

H. L. (E.) 1911 — *June* 13.

STEAD . . . . . APPELLANT;

AND

SMITH . . . . . RESPONDENT.

Practice—Costs—Taxation — Non-contentious Business — Jurisdiction—Proper Officer—District Registrar of Manchester—Solicitors Act, 1843 (6 & 7 *Vict.* c. 73), *s.* 37—*Rules of the Supreme Court, Order* XXXV., *r.* 6A; *Order* LXI., *r.* 1B; *Order* LXV., *r.* 26A.

Application having been made, by originating summons in the Manchester District Registry, before the amendment in July, 1910, of Order XXXV., r. 6A, to a judge of the King's Bench Division sitting at Manchester for an order referring a bill of costs of a solicitor for non-contentious business to the district registrar for taxation:—

Held, that "the proper officer" to tax the bill within s. 37 of the Solicitors Act, 1843, was not the district registrar, but a Master of the Supreme Court.

APPEAL from a decision of the Court of Appeal in England. (1) Richard William Stead, a solicitor practising in Manchester, was one of the executors and trustees of the will of his wife, Alice

(1) [1910] 2 K. B. 713.

Stead, who died in 1897, and by the terms of her will was entitled to be paid his professional and other charges for work done for her estate. He did a large amount of work in connection with the trusts of the will, and he died in 1907, having by his will appointed the appellants, Arthur James Stead and Annie Stead, his executors. The appellant A. J. Stead was also a solicitor practising in Manchester. In 1909 the trustees of the will of Alice Stead were the appellant A. J. Stead and the respondent, and in that year the appellants delivered to the respondent a bill of fees, charges, and disbursements due by the trust to them as the executors of R. W. Stead in respect of non-contentious work done by him down to the date of his death.

In January, 1910, the appellants took out an originating summons in the Manchester District Registry of the King's Bench Division of the High Court asking that the bill of costs might be referred to the district registrar in Manchester to be taxed. The summons was opposed by the respondent and was referred to Walton J., sitting as judge in chambers at Manchester. The learned judge dismissed the summons, and his order was affirmed by the Court of Appeal upon the ground that under Order xxxv., r. 6A (as the rule then stood) (1), and Order lxi., r. 1B, the Court had no jurisdiction to refer a bill of costs for non-contentious business to the district registrar, but ought to refer it to a Master of the Supreme Court to be taxed at the Central Office.

The Appellant A. J. Stead in person. "The proper officer of the Court" within s. 37 of the Solicitors Act, 1843, is the officer whose duty it is to tax the costs of proceedings in the Court before whom the proceedings come: *Owen* v. *London and North Western Ry. Co.* (2); *In re Park.* (3) If the section had meant "taxing Master" it could have said so, but a comprehensive term was necessary because the taxing officer has different names in

(1) In July, 1910, Order xxxv., r. 6A, was amended as follows: "Order xxxv. rule 6A shall be read as if after the word 'Manchester' the words 'or where a summons is issued in either of those district registries for the taxation of the costs of a solicitor under any statute or otherwise' were inserted, and as if after 'Taxing Master' the words 'of the Supreme Court' were inserted."

(2) (1867) L. R. 3 Q. B. 54, 60.

(3) (1889) 41 Ch. D. 326, 335.

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different Courts. Under this section an application for taxation of a bill of costs for non-contentious business was to be made by petition of course to the Lord Chancellor or the Master of the Rolls, but that was altered by the Judicature Act, 1873, ss. 16, 34. After that Act applications for taxation in non-contentious proceedings were made in the Chancery Division and were matters to be dealt with by the judge in chambers: Order LV., r. 2, cl. 15. Then Order LXV., r. 26A, which was made in 1903, provided that such applications might be made in any Division of the High Court. This application was rightly made by originating summons because that is the proper mode of application in the King's Bench Division. The Judicature Act, 1873, ss. 60, 62, as amended by the Judicature Act, 1875, s. 13, provided for the establishment of district registries, and the district registrars are deemed to be officers of the Supreme Court. Under the rules of Order xxxv. originating summonses may be issued in the district registries of Liverpool and Manchester, and the costs of proceedings in the district registry are to be taxed in such registry, and the proper officer to tax those proceedings is the district registrar. It is true that those rules as they stood at the time when this summons was taken out did not in terms refer to the taxation of bills of costs in non-contentious proceedings, and r. 6A of Order xxxv. has since been altered. But it is submitted that the proper officer to tax costs in contentious proceedings in the Manchester registry must be also the proper officer within the Solicitors Act, 1843, to tax in non-contentious proceedings in that registry, because he is the only officer who has any experience of such matters. It was found that the judges of assize, who by the Judicature Act, 1873, s. 29, are to be deemed to constitute a Court of the High Court of Justice, did not afford sufficient facilities for the transaction of business in Manchester and Liverpool. Accordingly an Order in Council dated June 28, 1909 (1), provided for continuous sittings in those places by a judge of the King's Bench Division having the same jurisdiction as the judges of assize for the transaction of civil business. Walton J. was the judge appointed for the time being to sit at Manchester under this Order. This was a proceeding before him in the

(1) Since amended by an Order in Council dated August 2, 1910.

district registry, and in all such proceedings the proper taxing officer was the district registrar. The judge had therefore jurisdiction to refer this bill of costs to the district registrar. Order LXI., r. 1B, does not apply. The object of that rule was to put Chancery taxing Masters and Common Law taxing Masters on the same footing and to make them all Masters of the Supreme Court, and the rule provides that where a statute has directed taxation by a Master of the Supreme Court or has prescribed any Master as the taxing authority the powers under that statute shall be exercised by the taxing officers of the Central Office. But the Solicitors Act, 1843, does neither of these things. It merely empowers certain Courts to refer bills of costs to be taxed by the proper officer of the Court to which the application is made, and the authority to tax is derived, not from the statute, but from the order of the Court made under the statute. District registries were provided for the express purpose of facilitating local business, and the assignment of a judge of the High Court to sit continuously at Manchester is a further step in that direction. The effect of these provisions is to establish in Manchester a special Court with its own special officers. *In re Porrett* (1), whether rightly decided or not, has no application.

Peterson, *K.C.*, and *St. John Clerke*, for the respondent, were not called upon to argue.

LORD LOREBURN L.C. My Lords, I think on the point of law that the decision of the Court of Appeal ought to be affirmed for the reasons stated by the Master of the Rolls.

I must avow considerable sympathy with the gentleman who has appeared to argue his own case as appellant, in the prospect of his business being interrupted by successive hearings before the taxing Master, and it seems to me that really this appeal is the outcome of a conflict of convenience between the solicitor upon the one side and the solicitor upon the other. I know that taxing Masters always endeavour to do their duty in the most efficient and considerate manner, and I feel sure that the Master before whom this matter may come will, on this occasion, do his best to obviate the inconvenience caused to the appellant. I am

(1) [1891] 2 Ch. 433.

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afraid that there is no alternative except for us simply to affirm the judgment of the Court below; but I hope, and indeed I am sure, that it will always be borne in mind that all legal proceedings ought to be so far as practicable localized for the convenience of those concerned either in litigation or in any other legal business which may come before any officers of the Court.

Lord Atkinson. My Lords, I concur. I think that the judgment of the Court of Appeal was clearly right.

Lord Gorell. My Lords, I concur.

Lord Robson. My Lords, I also agree.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 13, 1911.

Solicitors for appellants: *C. P. Fielder, Le Riche & Co., for Arthur J. Stead, Manchester.*

Solicitor for respondent: *Francis M. Jeboult.*

[HOUSE OF LORDS.]

WILLIAM EDGE & SONS, LIMITED . . . APPELLANTS; H. L. (E.) 1911

AND

WILLIAM NICCOLLS & SONS, LIMITED . RESPONDENTS. *July* 21.

Passing off—Get-up—Abortive Patent—Utility—Get-up serving Useful Purpose —Deception of ultimate Purchaser—Injunction.

The plaintiffs' predecessor in business took out a patent, which was revoked before the plaintiffs took over the business, for parcelling up blue or other colour in a porous cloth or bag with a handle attached to it, so that the colour could be dissolved in water without staining the hands of the operator. During the continuance of the patent and for eighteen years after its revocation the plaintiffs and their predecessor in business sold laundry blue put up in a calico bag with a wooden stick attached to it of the kind shewn in the drawings annexed to the specification. These bags bore no name, but the get-up, of which the stick was the distinctive feature, had become identified in the mind of the public with the plaintiffs' goods. The defendants exactly imitated the get-up of the plaintiffs' goods, except that they attached to the bags a label bearing their name. The plaintiffs moved for an injunction to restrain the defendants from passing off their laundry blue as the plaintiffs' by imitating the get-up of the plaintiffs' goods, but they disclaimed any monopoly in the use of any form of stick for the get-up for laundry blue:—

Held, that the defendants were not entitled to appropriate the plaintiffs' get-up, either on the ground of the abortive patent or on the ground that the stick was an article of utility; that the defendants' get-up was calculated to deceive, the addition of the label, in the circumstances, not being a sufficient distinction; and that the defendants ought to be restrained by injunction.

APPEAL from an order of the Court of Appeal in England reversing an order of Swinfen Eady J. (1)

The action was brought by the appellants for the purpose of restraining the respondents from passing off their laundry blue, tints, or dyes as the goods of the appellants by imitating the get-up of the appellants' goods. The appellants were a limited company incorporated in 1894 to take over the business of a manufacturing chemist and dye merchant formerly carried on by William Edge. In 1884 William Edge obtained letters patent

(1) [1911] 1 Ch. 5.

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(No. 12,666* of 1884) for "a new or improved method of wrapping or parcelling up soluble or insoluble blue or other color," and the invention was described in the claim as "wrapping or parcelling up soluble or insoluble blue or other color in a bag or cloth of fibrous substances, provided with the attachment or handle C," the object of the invention being to prevent the staining of the operator's hands. This handle, which might be made of either wood, glass, indiarubber, gutta-percha, pressed paper, or other equivalents, was constructed with a knob at each end, as shewn in the drawing annexed to the specification, the knob at the lower end being inserted into the neck of the bag which was tied round the handle at a point immediately above the knob. This patent was revoked on June 29, 1891. From the year 1884 down to the present time the appellants and their predecessor in business had sold laundry blue in a cylindrical-shaped block got up in a plain calico bag with a short round wooden stick or handle attached to it similar to that described in the drawing annexed to the specification, and since 1893 the appellants and their predecessor in business had sold tints similarly got up. Since 1896 the appellants had also sold dyes under a similar get-up. The bags in which the appellants' goods were wrapped bore no name, and to many of the public the appellants' name was unknown. The appellants' goods had a very large sale and had acquired a high reputation with the public. Laundry blue, tints, and dyes were sold across the counter to members of the public in single bags at the price of one penny. The distinctive feature of the get-up of the appellants' goods was the presence of the stick attached to the neck of the bag, the rest of the get-up being common to the trade, and, until the respondents, shortly before the commencement of this action, began to copy the appellants' get-up, no other dealer in laundry blue, tints, or dyes had used a stick as part of the get-up of his goods. The presence of the stick had for many years past become identified in the minds of the trade and the public with the appellants' goods, and customers wanting goods of the appellants' manufacture frequently asked for the blue, tint, or dye "with the stick in it."

The respondents were a limited company incorporated in 1907

for the purpose of taking over the business of the manufacture and sale of laundry blue, tints, and dyes which had been carried on by William Niccolls since the year 1901. Until shortly before the commencement of the action the respondents and their predecessor in business put up their laundry blue and tints in bags of a cylindrical form with a long frill protruding above the point at which the bags were tied to enable the bag to be held by the fingers while using. On November 17, 1909, the respondents caused themselves to be registered as the proprietors of an alleged new and original design for a block of blue or dye, such design being substantially identical with the get-up of the appellants' goods. In April, 1910, the respondents changed their former get-up and proceeded to put upon the market laundry blue and tints in a get-up exactly copied from the get-up of the appellants' goods, the only difference being that the bags bore a label containing the name "Niccolls." Some of the labels also contained the following statement:—"The design of this article with handle attached is the registered property of William Niccolls & Sons, Ld."

On May 30, 1910, the appellants issued the writ in this action, and they shortly afterwards moved for an order that the respondents, their servants and agents, be restrained until the trial of the action, or until further order, from passing off, or attempting to pass off, any laundry blue, tints, or dyes not of the manufacture or merchandise of the appellants as or for the goods of the appellants by imitating the get-up of the appellants' laundry blue, tints, and dyes, or in any other way, and from supplying or attempting to supply or enabling others to supply to persons asking for or ordering laundry blue, tints, or dyes "with the stick in it" any laundry blue, tints, or dyes not being the goods of the appellants as or for the goods of the appellants. Upon this motion there was no evidence of actual deception, but there were numerous affidavits by retail grocers in various parts of the United Kingdom stating that the get-up adopted by the respondents so nearly resembled the get-up of the appellants' goods as to be calculated to deceive. The only evidence filed in opposition to the motion was an affidavit of William Niccolls, the managing director of the respondents, who admitted for the purposes of the

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motion that blue or tints got up in a bag with a stick in it, provided the bag was without a label, would now be accepted by the trade and ultimate consumers as blue or tints of the appellants' manufacture. The appellants also moved for rectification of the register of designs by expunging the entry of November 17, 1909. The latter motion was not opposed by the respondents. Both motions came on together for hearing before Swinfen Eady J. The learned judge made an order, by consent, for the rectification of the register, and upon the motion for injunction he made an order in respect of laundry blue and tints in the terms of the notice of motion. From this order the respondents appealed.

In an affidavit filed by the appellants' managing director, Knowles Edge, in support of the motion before Swinfen Eady J., he stated that the distinctive feature of the get-up of the appellants' goods was the presence of "a stick" attached to the bags containing the goods, but upon the appeal to the Court of Appeal the present appellants (the respondents in the Appeal Court) expressly disclaimed any monopoly in the use of any stick as part of the get-up for laundry blue or tints and offered to modify the form of the injunction if the Court were of opinion that the order of Swinfen Eady J. was too wide. The Court of Appeal discharged the order of Swinfen Eady J., both on the ground that the stick, having formed the subject-matter of a patent, had become public property, and on the ground that the stick was a useful part of the article.

June 14, 15. *Buckmaster, K.C., Hon. Frank Russell, K.C.*, and *J. G. Joseph*, for the appellants. The get-up of the respondents' goods is calculated to deceive inasmuch as it is an exact imitation of the appellants' get-up, except that the bags of the respondents have a label attached to them bearing the respondents' name; and the appellants' get-up is distinctive. But the respondents' case is that the stick, though distinctive of the appellants' goods, is a distinction which the appellants have no right to claim. It is said, first, that the fact of having taken out a patent, however bad, for this method of packing is sufficient to prevent the patentee by user for any number of years from obtaining any rights in this method, and, secondly, that this stick is a useful

adjunct, and that any person may take advantage of that utility. As to the first objection, it is not disputed that if goods are made under the protection of a patent and are called by a particular name, any one on the expiration of the patent may make the goods and may sell them under that name. But suppose on the expiration of the patent no one in fact used that name and the public did not avail themselves of the right which they had, it does not follow that the patentee cannot acquire after the expiration of the patent a right which he did not possess at the date of the expiration. If the public do not make use of their right so to call the article, then the man who alone so calls it obtains by long exclusive user the right to say that that name has become associated with his goods; and for the purpose of this argument there is no distinction between the name and the form of the article. At the expiration of the patent everybody may manufacture the article and may call it by the name by which it has become known, but not so as to lead people to believe that the article is the article of the patentee. As to the second objection, the appellants admit that the stick has some utility, but it does not follow that this particular form of stick may be imitated. Every form of get-up has utility to some extent. The respondents may use a muslin wrapper and they may use a stick for the get-up of their goods, but they must not use the muslin wrapper and the stick in such a form as that their goods may be mistaken for the appellants'. The appellants do not claim here, and have never claimed, a monopoly in the use of any stick for the get-up of blue and tints. A get-up consisting of a variety of elements each one of which is common may in its entirety become distinctive, and the absence of the name of the plaintiff on his goods and the affixing of the name of the defendant on the rival goods are not conclusive on the question whether the defendant's get-up is calculated to deceive: *Lever* v. *Goodwin*. (1)

Alexander Grant, *K.C.*, and *R. Frost*, for the respondents. 1. When a man has by a patent dedicated a particular invention to the public he cannot after the expiration of the patent claim a monopoly in the patented article. The appellants or their predecessor in business during the life of the patent made and

(1) (1887) 36 Ch. D. 1.

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sold the particular form of stick now in use as the patented article, and having once made that article publici juris it is not now open to them to claim protection for it. There is nothing distinctive in the appellants' get-up except the stick, and that is the patented invention which has become common property.

2. A man cannot by a long course of manufacture and sale of a useful article of commerce acquire a monopoly in that article of commerce. This is a composite article, and the handle or stick is a useful part of that article. The article is a blue bag with a handle attached to it ready for use, and the handle serves a useful purpose. The stick is not get-up, it is handle; and it is the simplest possible form of stick. If the appellants desired to claim a monopoly for it they should have made some ornamental or capricious addition thereto. Anything which is useful in itself is not part of the get-up, but rightly belongs to the article itself: *J. B. Williams Co.* v. *H. Bronnley & Co., Ld.* (1) In *Lever* v. *Goodwin* (2) these considerations did not arise.

3. There is here no probability of deception. The label bearing the respondents' name is a sufficient indicium of origin. There can be no better mode of distinguishing goods than by the addition in plain letters of the maker's name. There is here no question of actual deception, and the test of probable deception is whether the thing taken in its entirety is such that a person with reasonable apprehension and with proper eyesight would be deceived. If a purchaser is so careless that he does not read the name which is plainly written on the face of the label he cannot be said to be deceived: *Schweppes, Ld.* v. *Gibbens.* (3)

Buckmaster, K.C., in reply. As regards the patent it was admittedly a patent for an invention which had no existence. If no patent had been taken out no one appropriating the form of get-up which the appellants had used for a great number of years could have acquired any right associated with that peculiar form of get-up, and the former existence of this abortive patent makes no difference. As regards utility the block of blue, the bag, the frill, the stick might all be different in form without

(1) (1909) 26 Rep. Pat. Cas. 765, at p. 777, per Fletcher Moulton L.J.
(2) 36 Ch. D. 1.
(3) (1905) 22 Rep. Pat. Cas. 601, at p. 606.

affecting the utility of the article, but here every minute detail has been copied. It is not the particular form of any one of these items which imports utility. As regards the addition of the label, if this were a case of two labels like *Schweppes, Ld.* v. *Gibbens* (1), and the labels were distinguished by the names of the rival firms, that might be a sufficient distinction. But here the public have become accustomed to rely on the get-up as the indicium of origin. It is not the absence of the label on which they rely; that is only one of several characteristics and is not the essential feature of the appellants' get-up. The effect of putting the respondents' name upon a get-up which is otherwise indistinguishable from the appellants' will be to make the public believe that the respondents are the makers of the goods which they know only by the get-up; and it is established that a man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name: *Birmingham Vinegar Brewery Co., Ld.* v. *Powell.* (2 In determining probability of deception the class of customer is to be considered.

The House took time to consider.

July 21. EARL LOREBURN L.C. My Lords, I agree in the conclusion at which your Lordships have arrived in this case and in the judgment which will be proposed.

LORD GORELL. My Lords, in this case the plaintiffs moved to restrain the defendants from passing off their blues and tints as and for the goods of the plaintiffs, as they alleged the defendants had done, and threatened to continue to do. Swinfen Eady J., before whom the motion came, granted an injunction, but his order was reversed by the Court of Appeal, from whose decision this appeal is now brought to your Lordships' House.

The facts are not in dispute to any material extent and may be shortly stated.

In November, 1894, the plaintiff company were incorporated

(1) 22 Rep. Pat. Cas. 601. (2) [1897] A. C. 710, at p. 715.

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to take over a business previously carried on by Mr. William Edge.

In the year 1884 Mr. Edge had begun to make and sell certain laundry blues, got up in a manner shewn in the specimens which have been produced to your Lordships, and in 1893 he began to make and sell tints got up in a similar manner. After they took over Mr. Edge's business the plaintiffs continued, and still continue, this manufacture and sale.

In 1884 Mr. Edge took out a patent for what he seems to have regarded as an invention, and his claim was for "wrapping or parcelling up soluble or insoluble blue or other color in a bag or cloth of fibrous substances, provided with the attachment or handle C, substantially as and for the purposes herein set forth." It seems to be perfectly clear that the patent was bad, and the letters patent were revoked by an order on June 29, 1891, before the formation of the plaintiff company.

Mr. Edge and his successors, the plaintiffs, however, continued the manufacture and sale of the blues and tints, wrapped and parcelled in the manner described in the complete specification, and the particular feature of the article sold was that each was put up in a porous bag, the neck of which was tied round a small stick with a knob at each end, and thus the blue or tint could be dipped or dissolved in water without the hands of the person using it becoming wetted.

Until the defendants took the action complained of, no one except the plaintiffs had sold or offered for sale blues and tints done up in the same way as the plaintiffs' articles, and the plaintiffs appear to have extensively advertised their goods and to have acquired a high reputation for these blues and tints.

The manner in which the goods were done up has become associated in the minds of purchasers with the plaintiffs' goods, and the evidence shews that it has been relied upon by the public who use these goods, as distinguishing the plaintiffs' goods from all others.

The defendant company was incorporated in 1907, and took over a business previously established by Mr. William Niccolls. He and his successors, the defendants, before the month of April, 1910, made and sold tints and dyes done up in a different way

from the plaintiffs', and with the name "Niccolls' labelled thereon, but without an appliance by which to hold the bag in the water.

Shortly before this action was commenced, the defendants adopted the same method of wrapping and parcelling up as that used by the plaintiffs, and as specified in the revoked letters patent. The appearance of the defendants' goods was similar to that of the plaintiffs' goods, and the form and size of the stick used by the defendants were similar to the form and size of those used by the plaintiffs. The only difference which appeared between the two was that the defendants had a label on their goods on which the name of "Niccolls" appeared, whereas there was no label on the plaintiffs' goods. The defendants, in November, 1909, registered a design in substance identical with the design of the plaintiffs' goods, but the entry of this design has been expunged by order of Swinfen Eady J.

The complaint made by the plaintiffs is that the get-up of the defendants' goods so nearly resembled the get-up of the plaintiffs' goods as to be calculated to deceive and to lead to the defendants' goods being passed off on persons who wish to buy the plaintiffs' goods.

The principle to be applied to a case of this kind has been repeatedly stated in the Courts and your Lordships' House, and I will merely state it as it was expressed by Lord Halsbury in the case of *Birmingham Vinegar Brewery Co., Ld.* v. *Powell* (1): "No man can have any right to represent his goods as the goods of another person, but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another."

The real question in the case is one of fact, namely, whether the defendants' goods so resemble the plaintiffs' as to be calculated to deceive the persons who buy. There is no dispute that the plaintiffs have acquired a high reputation for their goods and have a very large sale thereof, nor that the method they have adopted of packing the articles to be used with a stick of the kind and form shewn in the specimens has become associated and identified with the plaintiffs' goods, but the

(1) [1897] A. C. at p. 711.

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defendants maintain that they are not liable to be enjoined for several reasons.

The first is that they have done nothing more than copy the description in the specification of the revoked patent; that they were entitled to do so; and that the plaintiffs cannot interfere, because, as the defendants assert, no one can be restrained from making an article which has been the subject of a patent after the patent has come to an end. It seems to me, however, that this point in no way meets the plaintiffs' case. The patent was a thoroughly bad patent and had been put an end to before the plaintiffs had been incorporated. But afterwards no one besides the plaintiffs made and sold these goods got up in the manner and with the appearance of theirs. Any one could originally have done what Mr. Edge and the plaintiffs, his successors, did. They, however, gradually acquired the reputation aforesaid, and the public associated the form in which the blues and tints were put on the market with the plaintiffs' goods, even though the ultimate buyers may not have known the name of the plaintiff company. For nearly twenty years this has gone on, and the fact that there had been an old and useless patent seems to me to have no real bearing on the position which had thus developed. No authority was cited which in any way helped the defendants on this point, although it seems to have been the point which led the defendants to adopt the course pursued by them.

The second point made by the defendants was that the plaintiffs were seeking to restrain them from selling an article of utility, that is to say, were trying to prevent the defendants from selling their blues and tints with a stick attached, and that the plaintiffs were not entitled to do so. It appears to me, however, that if this ever were the claim of the plaintiffs it is not the way in which the case is now presented by them, and their counsel disclaimed the idea. When, however, one examines the affidavits filed by the plaintiffs it looks to me as if there were some ground for contending at the outset that the plaintiffs were endeavouring to restrain the defendants from using any stick with their goods (see in particular the first affidavit of Mr. Edge, paragraph 3, and his second affidavit, paragraph 3), or that, at any rate, there was some ambiguity about their exact claim, and

that sufficient distinction was not made between "the stick" and "a stick." I do not read Swinfen Eady J.'s judgment as intended to prohibit the use of any stick, and I find the following statements in the appellants' case:—"It was contended in the Court of Appeal by counsel on behalf of the respondents that the appellants were endeavouring to restrain the respondents from putting up bag blue or tints with any stick in it, and were endeavouring to obtain a monopoly. This was expressly disclaimed by counsel on behalf of the appellants, who stated that what was complained of was the exact imitation or copying by the respondents of the get-up which, for a period of eighteen years since the revocation of the patent, had been exclusively used by the appellants in connection with their goods and was relied upon by the public as distinguishing the appellants' goods."

"In accordance with this disclaimer, the appellants by their counsel offered to modify the form of the injunction if the Court of Appeal were of opinion that the order of Swinfen Eady J. was too wide in its terms and prevented the respondents from using any stick."

The disclaimer and offer thus made were repeated in this House. I understand the complaint to be that the defendants imitated the get-up of the plaintiffs' goods so closely as to be calculated to deceive when there was absolutely no necessity for doing so, and indeed it seems to me to be clear that the defendants, if they chose to use something to keep the hands of the user out of water, could have done so in many different ways, and that if they chose to use a stick they could use one in a different form or shape or size, so as not to be liable to produce deception. I do not think this was, or could be, disputed.

I now come to what appears to be the real point in the case, namely, whether what the defendants have done, and threaten to continue to do, was calculated to lead to their goods being mistaken for the plaintiffs'. I have already pointed out that the plaintiffs have acquired a high reputation for their goods on account of their excellent quality, and had a very large sale thereof, and that the form in which they were produced was associated with the goods being the goods of the plaintiffs, and in

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the affidavit of Mr. William Niccolls, the managing director of the defendant company, he admits at p. 25 of the record that "for the purposes of this motion, blue or tints got up in bags with a stick in it provided the bag is without a label would now be accepted by the trade and ultimate consumers as and for the well-known 'Dolly' blue and tint of the plaintiffs' manufacture." But it is said by the defendants that they have sufficiently distinguished the goods which they sold by a label with the name "Niccolls" upon it. Now, if the only question were how far the defendants' goods were likely to be mistaken for the plaintiffs' by the wholesale and retail dealers, I think there would be a difficulty in suggesting that the defendants had not sufficiently distinguished their goods from those of the plaintiffs, for those connected with the trade have the requisite trade knowledge to protect them. Notwithstanding this, it may well be that purchasers from the retail trade, that is to say, the public buying over the counter, may be deceived; they have not the requisite trade knowledge to protect them, and in this case the ultimate purchasers are those who are of final importance to the plaintiffs. It seems clear that the mere fact of a label being upon the goods with a name upon it would not necessarily cause such persons as last referred to to distinguish one set of goods from another, though sufficient to inform the wholesale and retail traders of the difference, especially where, as in a case like this, the traders received the goods in boxes marked with names, and where such traders no doubt have the means of knowing, and are easily able to ascertain, which goods are the plaintiffs' and which goods are the defendants'. But the class of goods which are sold and the circumstances in which they are sold have to be taken into consideration. The goods in question are made up in penny packets, and are chiefly purchased over the counter by washerwomen, cottagers, and other persons in a humble station of life. No name or description appears upon the wrapper containing the plaintiffs' blues and tints, and to many of such persons the plaintiffs' name is unknown.

The evidence seems to shew that they relied upon the get-up of the plaintiffs' goods to obtain goods made by the manufacturer with whom that get-up has become associated (see the affidavit

of Mr. Haslam, record, p. 19). The poorer classes, who buy this class of goods, do not seem to distinguish the goods by the label, but by the general appearance which the articles present. It is not necessary, in my opinion, for the plaintiffs to prove that the ultimate purchasers, who are likely to be misled, know the name of the plaintiffs' firm. Buyers of the plaintiffs' goods, without any label at all, might, if they bought the defendants' goods and noticed the label, still think, having regard to the appearance of the goods, that they were goods which had been long on the market, and that the name of the manufacturer was now disclosed to those who did not previously know it. The language used by Lord Herschell in the case above cited is very appropriate in this case. He says (1): "I think that the fallacy of the appellants' argument rests on this: that it is assumed that one trader cannot be passing off his goods as the manufacture of another, unless it be shewn that the persons purchasing the goods know of the manufacturer by name, and have in their mind when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another, if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name at all."

I think, on the whole, when the undisputed facts of this case are considered, that the defendants have not sufficiently, having regard to the nature of the goods and the persons to whom they are sold, distinguished the goods sold by them in appearance from the goods sold by the plaintiffs. This view by no means suggests that the defendants are not at liberty to use a stick in the preparation of their goods, but that if they do so they must sufficiently distinguish the goods by the form of the stick or by other means from those which are sold by the plaintiffs. Although the question appears to be really for the consideration of the tribunal as to whether, having regard to the appearance of the goods and the class of people to whom they are sold, deception is likely to occur, it may be noticed that the view which I have expressed appears to accord with that which may be inferred from the body of evidence filed by the plaintiffs to shew the

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likelihood of deception, and that no evidence from persons in the trade or others has been filed to meet this on the part of the defendants.

I think the case turns entirely upon a question of fact. If the plaintiffs were attempting to prevent the use of "a stick" I should agree with the decision of the Court of Appeal, and I think that the Court regarded the disclaimer of counsel as an attempt to limit a claim which had not been and was not being effectively limited. But when it is admitted that the defendants have copied the appearance and arrangement of the plaintiffs' goods and distinguish theirs only by a label, and when it is perfectly possible to distinguish goods which contain similar elements of utility in many other ways suggested, so that there should be no reasonable probability of mistake, it seems to me that the label alone in the particular circumstances is not, for the reasons which I have given, sufficient.

Some observations appear to have been made as to the conduct of the case, but it seems to me that both parties put their respective cases without exaggeration and shewed no material difference as to the facts, the plaintiffs relying on an acquired reputation and association of the get-up of the goods with their make, and the defendants relying mainly on the right they claimed to make the goods in accordance with the description in the revoked patent, and on the fact that they had sufficiently distinguished their goods by a label. With regard to the affidavits, your Lordships have been informed that copies of only five affidavits were supplied to and paid for by the defendants, and that the very large number filed by the plaintiffs were similar to one or other of the five. The question of excess with regard to these affidavits is a matter for taxation.

In my opinion the appeal should be allowed, but in order to avoid any difficulty the injunction should be modified, and this may be done by omitting the words after "any other way" to the end of the sentence. (See record, p. 52.)

LORD ROBSON. My Lords, in this case the appellants or their predecessor have, since 1884, manufactured laundry blue, and sold it in small cylindrical blocks, each of which is wrapped up

in a plain white calico bag tied at the top so as to form a fringe. From the middle of this fringe there protrudes a short round stick terminating in a little knob at the top, and this stick serves as a handle enabling the user to hold the bag in the washing water without staining her fingers with the dissolving blue. These bags bore no manufacturer's name or other indication of origin. They were sold with the simple get-up above described, and apparently identified by retail purchasers as "the blue with the stick in it." As such they are said to have acquired a good reputation. It is somewhat surprising to find that in 1884 the appellants (plaintiffs) obtained a patent (No. 12,666* of 1884) for this plain method of wrapping up blue, which was not revoked till June, 1891.

The respondents are also manufacturers of blue, and they or their predecessor have carried on business since 1901. They used to sell their goods in bags like those of the plaintiffs, but without the stick. Instead of the stick their bags had a fringe which was longer than that of the plaintiffs' bags, and this fringe served, rather imperfectly, the purpose of a handle. In or soon after November 1909, they altered the get-up of their goods so as to make them correspond in all material respects with those of the plaintiffs, except that they affixed to them a label bearing their own name. They thought themselves entitled thus to appropriate the plaintiffs' get-up because it was comprised in the patent, and they contended that whatever was comprised in the patent must be taken on revocation to be thrown open to the public. They also contended that as far as differentiation might be necessary under such circumstances the label with their name on it was sufficient.

I cannot accept the argument of the defendants on these two points. I think the position of the plaintiffs, after their patent had been revoked, was neither better nor worse in regard to the mere get-up of their goods than if the patents had not been granted. They made an attempt to patent as an "improved method" what, in truth, was only a "get-up," and therefore not patentable at all. They gained, of course, no proper title to any privilege by this proceeding; but I do not see on what ground they can be held to have forfeited the

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right a trader at all times has to prevent his competitors from seeking to deceive the public by passing off their goods as his own. Any member of the public can avail himself of any device of utility, disclosed by the abortive patent; e.g., he can affix a wooden handle or stick to the bag, not because that device was thrown open to the public by the publication or revocation of the patent, but because he has a good common law right to do so, of which no patent can deprive him. If, however, he proceeds to copy the plaintiffs' shape or kind of stick together with the rest of the plaintiffs' "get-up" so as to mislead the public, he infringes a principle of law which is independent of the Patent Acts.

The confusion that has arisen in the case is mainly due to the inconsistent contentions put forward by the plaintiffs themselves. In their patent they claimed that the use of a stick, in any way described, was a device of utility. It was, indeed, the substance of their alleged invention. In their action, and at the hearing before Swinfen Eady J., they apparently treated the stick as mere get-up; that is to say, as a means only of distinguishing and identifying the goods. That was the footing on which Swinfen Eady J. dealt with the case.

Throughout his judgment he refers to the stick merely as a distinguishing feature in the appearance of the goods and not in its aspect as a handle or device of utility. He granted an injunction in general terms, but it specifically restrained the defendants from supplying or enabling others to supply to persons asking for blue "with the stick in it" any blue not being goods of the plaintiffs. It does not, as the Master of the Rolls points out, contain the words usually found in such cases "without sufficiently distinguishing the defendants' goods from the goods of the plaintiffs." I think the effect of the injunction, especially when read with Swinfen Eady J.'s judgment, is seriously to interfere with the defendants in making bags with any kind whatever of stick or wooden handle in them. Such an injunction cannot, in my opinion, be supported in its present form.

On the other hand, the Court of Appeal regarded the stick merely in its aspect as a useful handle, and gave no effect to its shape or style as part of the get-up.

It is admitted that the defendants deliberately appropriated the complete get-up of the plaintiffs' goods, such as it was, with the addition only of their own label. They even registered the design as a new and original design of their own, and on some of the labels they affixed to the bags they asserted that "The design of this article with handle attached is the registered property of William Niccolls & Sons, Limited." No explanation in the evidence is given of this remarkable proceeding. The defendants evidently attached importance, not only to the stick as a device of utility, and as such open in one form or another to public use, but also to the design of the article as a whole, including the shape of the stick, and they copied it almost exactly. This was going too far. I agree that the get-up of the plaintiffs' bags was of such a simple and elementary character that it was perhaps the cheapest form possible, and any differentiation might possibly have involved some expense, but differentiation within reasonable and economical limits was undoubtedly possible and was omitted because the defendants said they were entitled to take, and certainly meant to take, and did take, the design as it stood.

However, they urge that they put their name on the labels stuck on the bags, and so differentiated their goods from those of the plaintiffs by the most direct and conclusive of all methods. In fact, the attachment of their name to the plaintiffs' design or get-up amounted, in the circumstances of this case, to a deliberate appropriation of that get-up as their own. The bags of the plaintiffs had been unnamed. They were sold on their appearance or get-up alone, so when the name of the defendants was put on them, with an intimation that the design, by which the public were accustomed to identify them, was their property and an indication of their goods, customers would naturally suppose that, in buying them, they were getting the same goods as they had previously bought in the unnamed bags. Instead of differentiating their goods from those of the plaintiffs the name on the bags had the effect of making the customers believe that they were the same people as the plaintiffs.

I think, therefore, that the plaintiffs are entitled to an

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injunction, though not in the form granted by Swinfen Eady J., and that this appeal should be allowed.

LORD ATKINSON. My Lords, I concur.

Order appealed from reversed and order of Swinfen Eady J. varied by omitting the words "and from supplying or attempting or enabling others to supply to persons asking for or ordering laundry blue or tints 'with the stick in it' any laundry blue or tints not being the goods of the plaintiffs as or for the goods of the plaintiffs" and subject to the said variation restored. The respondents to pay to the appellants the costs incurred by them in the Court of Appeal and the costs incurred by them in respect of the appeal to this House and to repay to the appellants the costs paid by the appellants to the respondents under the order of the Court of Appeal. The cause to be remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 21, 1911.

Solicitors for appellants: *Ernest Salaman & Co.*
Solicitors for respondents: *Haslam & Sanders.*

[PRIVY COUNCIL.]

J. C.*

1911

July 4, 5, 25.

CITY OF VANCOUVER . . . . . DEFENDANTS;

AND

VANCOUVER LUMBER COMPANY AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Action of Ejectment—Validity of Dominion Lease to Plaintiffs—Deceit on the Crown—Plaintiffs without Notice of previous inconsistent Grant (if any).

The appellants claimed to have been in possession of the property in suit under a grant from the Dominion Government on June 8, 1887, of the use of land contiguous thereto as a park, and also under a lease from the Dominion dated November 1, 1908, for ninety-nine years, which did not expressly include the property in suit and was moreover subject to any existing leases of portions of the said land:—

Held, in a suit by the respondents, who derived title under a Dominion lease dated February 14, 1899, that the appellants as defendants in possession could not object thereto as not having been granted under the Great Seal, since that point had not been put forward in the Courts below; nor on the ground that it had been obtained by deceit practised on the Crown, since the respondents were without notice, actual or constructive, of a previous Crown grant (if any) to the appellants inconsistentt herewith.

APPEAL by special leave from a decree of the Court of Appeal (November 1, 1910) reversing a decree of Morrison J. (January 31, 1910).

The action was brought under the circumstances stated in their Lordships' judgment to determine the right to the possession of an island, known as Deadman's Island, which is situated in Coal Harbour in Burrard Inlet near the city of Vancouver. This island, as has been decided in a suit between the Province of British Columbia and the Dominion of Canada ([1906] A. C. 552), belongs to His Majesty in right of the Dominion.

The appellants pleaded possession and disputed the validity of the lease to the respondents dated February 14, 1899.

Morrison J. held that Deadman's Island formed part of the military reserve which by Order in Council dated June 8, 1887,

* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, LORD DE VILLIERS, and LORD ROBSON.

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was handed over to the appellants for use as a public park, that possession thereof had immediately been taken by the appellants, that large sums of money had on the faith of that Order in Council been spent by them in improving and maintaining the reserve as a public park, and that the appellants had been in possession of Deadman's Island from 1887 without any interruption. He further held that the right title and interest of the appellants to and in Deadman's Island under and by virtue of the said Order in Council were not prejudiced by the Order in Council dated August 31, 1906, or by the lease dated November 1, 1908. He further held that the lease dated February 14, 1899, under which the respondents claimed title, was invalid and not only infringed the rights of the appellants to the knowledge of the respondents but also violated the terms on which the reserve had been transferred by the Imperial Government to the Dominion of Canada; and that the Crown had been deceived in its grant of the said lease to the Vancouver Lumber Company. He dismissed the action.

The Court of Appeal gave the respondents a decree for possession.

The Chief Justice held that the respondents' lease was valid and that the appellants' lease did not include Deadman's Island, and that the appellants by accepting that lease and by reason of the Order in Council of August 31, 1906, had lost any rights which they might have had in the said island. Irving J. considered it doubtful whether Deadman's Island was included in the lands referred to in the Order in Council of June 8, 1887, but that if it were so included, then by the Order in Council dated August 31, 1906, the Crown resumed possession of Deadman's Island within the meaning of the Order in Council dated June 8, 1887, and that thereupon the appellants lost all title to the said island; and that the respondents' lease was valid. Martin J. held that the Order in Council of 1887 was at most a revocable licence to use the island as a public park and was in fact and in law revoked by the respondents' lease.

Buckmaster, K.C., Macdonald, K.C., and *Macnaghten,* for the appellants, contended that they were in possession under the

Order in Council of 1887 and the lease of November 1, 1908, and that whatever the infirmities of their title the respondents had not proved their right to eject them. No statutory or other authority had been shewn for making the said lease to the respondents, and it was contended that it was null and inoperative, and at all events could not deprive the appellants of the right to possession which was vested in them and which they had exercised for so many years, spending large sums of money thereon, and acquiring rights therein which could not be divested until the Dominion required the island for military purposes. They also contended that the lease was void as not having been made under the Great Seal; and also that the Crown had been deceived in its grant. It was inconsistent with the grant under which the appellants held; and it was the duty of the respondents to have disclosed that inconsistency and to have obtained a recital of the previous grant in their lease, failing which their lease was invalid. Reference was made to *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1); Public Lands Grants Act, R. S. C., 1906, c. 57, s. 2 (*b*) and s. 4; 2 Rolle's Abr. 182; *Lane's Case* (2); *Ontario Mining Co.* v. *Seybold* (3); *Alcock* v. *Cooke*. (4)

Davis, K.C., and *Rowlatt* (*Sir R. Finlay, K.C.*, with them), for the respondents, contended that their lease of February 14, 1899, was a valid one, had never been determined, and was not determinable by the Government until the island was required for military purposes. It was duly authorized by the Ordinance and Admiralty Lands Act, R. S. C., 1886, c. 55, which by s. 4, sub-s. 4, provides that lands which it is not deemed necessary to occupy for the defence of Canada in time of peace may be leased or otherwise used as the Governor in Council thinks best for the advantage of Canada. Reference was also made to the Public Lands Grants Act, R. S. C., 1906, c. 57, s. 2 (*b*) and s. 4. The lease to the appellants of November 1, 1908, did not include the island, nor did the grant of June 8, 1887, which moreover only amounted to a revocable licence, which was revoked by the Order of August 31, 1906, and surrendered by the acceptance of the lease of 1908. The lease to the respondents moreover was a

(1) [1906] A. C. 552.
(2) 1 Rep. (pt. 2) 16b, 17.
(3) [1903] A. C. 73.
(4) (1829) 5 Bing. 340.

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resumption of the island by the Government: *Doe* d. *Davies* v. *Thomas*. (1) As to the Great Seal being required, the point was not taken in either Court below; and as regards deceit there was no operative grant in existence inconsistent with the respondents' lease, and if there had been the respondents were not shewn to have had any actual or constructive knowledge of it: see *Alcock* v. *Cooke*. (2)

Buckmaster, K.C., in reply.

1911 *July* 25.

The judgment of their Lordships was delivered by

LORD MERSEY. This is an appeal from a judgment of the Court of Appeal of British Columbia, dated November 1, 1910, reversing the judgment of Morrison J. dated, January 31, 1910.

The writ, which was issued on June 7, 1909, claimed possession of an island known as Deadman's Island, situate in Coal Harbour in Burrard Inlet, city of Vancouver. At the date of the writ the island was in the possession of the defendant city, and the question at issue between the parties was whether the plaintiffs (the Lumber Company and Ludgate) had a title to the property as against the city.

The facts are shortly as follows. Deadman's Island, which is about five acres in extent, has either been a military reserve of itself or has formed part of a larger military reserve comprising the island and an adjoining peninsula since the year 1858, and it now belongs to the Crown in right of the Dominion of Canada. It lies off a peninsula of the mainland, from which it is separated by a narrow channel which is dry at low tide. It is always shewn and described on maps and charts as an island. In 1886 the corporation of the city of Vancouver was formed and the boundaries of the city were prescribed. The reserve fell within the boundaries.

In the summer of the same year the mayor and aldermen of the city presented a petition to the then Governor-General of Canada in Council, which, after reciting that land known as "the Dominion Government Military Reserve" was within the city limits, asked that they might have control thereof in order to

(1) (1851) 6 Ex. 854. (2) 5 Bing. 340.

use it as a park. This petition was referred to the Minister of Militia and Defence for consideration and report, and on May 10, 1887, that minister reported that he saw no objection to the proposal, provided the corporation kept the park in proper order, and the Dominion Government retained the right to resume possession when required at any time. The report went on to state that in the opinion of the minister the property would be required for military purposes, but that "until this" he recommended that the corporation should have the use of the same as a park "subject to the provisions mentioned." This report came before a Committee of the Privy Council on June 8, 1887, and the Committee advised "that the Minister of Militia and Defence be authorized to take the necessary steps for carrying the same into effect." The Order in Council is in the following terms :—

"Order in Council.

"Copy of the report of a Committee of the Honourable the Privy Council, approved by

"His Excellency the Governor-General in Council, on the 8th June, 1887.

"On a report dated 10th May, 1887, from the Minister of Militia and Defence stating that he has had under consideration a petition of the Mayor and Aldermen of the City of Vancouver, B.C., praying that the Dominion Government Military Reserve near the First Narrows bounded on the west by the English Bay and on the east by Burrard Inlet may be handed over to the said corporation for use as a park.

"The Minister reports that he sees no objection to this proposal, provided the Corporation keep the park in proper order, and the Dominion Government retain the right to resume the property when required at any time.

"The Minister further states that he does not deem it advisable to recommend that this property be transferred to Class 2 as not available for military use, as he is of opinion that it will be required for military purposes, but until this he recommends that the Corporation have the use of the same as a park, subject to the provisions mentioned.

"The Committee advise that the Minister of Militia and

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Defence be authorized to take the necessary steps for carrying the same into effect.

"(Signed) John J. McGee,
"Clerk, Privy Council."

A copy of this Order was sent to the Mayor of Vancouver, and on March 9, 1888, the city clerk wrote to the Minister of Militia and Defence asking what would be the character of the title to the lands given to the city, and suggesting that a lease for a long period subject to the conditions of the Order in Council should be the mode of conveyance. The receipt of this letter was acknowledged in due course in a letter which contained a promise that the matter should be "looked into." The city then proceeded to lay out the land for a park, and spent a large sum of money in so doing. On January 9, 1889, the Minister of Militia and Defence was made aware of the action of the corporation, for on that date the city clerk wrote to him stating that the city had already expended $30,000 in forming roads through the reserve, and asking that the Government should make a grant on account of the sum so expended. An answer was sent on January 26, 1889. This letter served also as an answer to the city clerk's letter of March 9, 1888, written on the question of title. The letter expresses the minister's regret that there are no funds available for the making of any grant, and it contains also this passage: "with reference to the City Clerk's enquiry what title will be given to the City of the land which the Corporation is permitted to occupy as park, I am to state that no other document can be furnished than the copy of the Order in Council of the 8th June, 1887, officially furnished to you by this department." Nothing further appears to have been done in the matter of the city's title to the land for many years.

In 1888 the park was opened to the public by the then Governor-General, Lord Stanley, and was called Stanley Park after him. Up to this time Deadman's Island had remained separated from the mainland as before described, but in 1890 (two years later) the city threw a bridge across the channel, thereby permanently connecting the island with the mainland.

They also made a trail over the island. It does not appear that the Government was apprised of the erection of this bridge or of the work done upon the island, and that the Government regarded the two properties, namely, the park and the island, as separate and distinct seems clear from two documents forming together Exhibit 32, and dated in 1896. These two documents are official memoranda drawn up in connection with an application which had apparently been made by some strangers for a lease of Deadman's Island. The first document describes the island by name and refers to it not as forming part of, but as being " contiguous " to, Stanley Park. The second document, which also refers to the island by name, declares it to be a property which the writer cannot recommend should be leased either to a corporation or to an individual. In this same year (1896) the city appointed one Eldon as park caretaker, and he employed a man named Hammersley to work in the park. Both these men used the bridge for the purpose of crossing to the island, and Hammersley availed himself of the opportunities so afforded him to build a cottage on the island, which he now occupies, and the title to which he claims, as against all the world. Hammersley does not appear to have been the only squatter; others came both to the park and to the island, and the city could not get rid of them. It was then resolved, in August, 1898, to petition the Governor-General to accord such a title as would enable the city to deal effectively with the evil which had arisen. This petition, after reciting that by the Order in Council of June 8, 1887, the reserve had been handed over to the city of Vancouver for use as a park, " subject to the right of the Dominion Government to resume the property when required at any time," and that no power was vested in the corporation of the city further than the right to use the said reserve as a park, and after reciting the existence of the nuisance caused by the squatters, and the absence of any power in the corporation to prevent the continuation thereof, prays for an Order in Council vesting the reserve in the corporation and conferring power to evict trespassers. This petition was duly forwarded by the Governor-General to the Minister of Militia and Defence, the Honourable Dr. Borden, with a request that it should be favourably

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considered. Nothing, however, was done upon it, although Dr. Borden, in a letter of September 3, 1898, to Mr. G. R. Maxwell, M.P., expressed an opinion that the Government might give a lease under which the city would have all the power they desired. Up to this time there had been no reference to the island, by name or otherwise, in the communications passing between the city and the Government.

While matters were in this position the negotiations began which led up to the title upon which the plaintiffs rely. On January 20, 1899, the plaintiff Ludgate, by his agent, a Mr. Martin, wrote to the Minister of Militia and Defence a letter, proposing to buy Deadman's Island, for the purpose of erecting thereon a large lumber mill. The result was not a sale but the grant of a lease by the Crown to the Vancouver Lumber Company (Ludgate's name in this connection) of Deadman's Island for a term of twenty-five years from March 1, 1899, at a yearly rent of $500. This lease is dated February 14, 1899. The granting of the lease was duly approved by an Order in Council of February 16, 1899. The lease was executed on behalf of the Crown by Dr. Borden, the Minister of Militia and Defence. Upon this lease being brought to the attention of the city authorities, they put forward a request to the Government on March 9, 1899, that it should be revoked, on the ground that Deadman's Island was comprised in the reserve mentioned in the Order of June 8, 1887. In answer to this request, the Deputy Minister of Militia and Defence wrote to the city clerk on April 15, 1899: "Deadman's Island has never been considered by this Department as in any way forming a portion of the Military Reserve granted to your Corporation by Order in Council in 1887." Ludgate then entered upon the island and began work. Thereupon a writ was issued against him claiming an injunction, and also a declaration that the plaintiff was the owner in fee simple of the island. This writ was not issued by the city, but by the Attorney-General of the Province of British Columbia in which the city is situate; and the claim was put forward on the ground that Deadman's Island was owned by the Crown in right of the Province, and not in right of the Dominion, and that therefore Ludgate, who claimed through the

Dominion, had no title. An interim injunction was granted. The effect of this proceeding was to bring the Attorney-General of Canada to the Court, and he was added as a defendant. This litigation lasted for about seven years. Ludgate took no active part in it, and in its final stages his name does not appear. In the year 1906 the case reached this Board, and it was then decided that Deadman's Island belonged to the Crown in right of the Dominion. The case will be found reported in [1906] A. C. at p. 552. In the meanwhile nothing had happened to the property except that in 1902 the bridge had been blown away by a gale of wind. But after the judgment negotiations were reopened between the city of Vancouver and the Dominion Government with the result that on August 31, 1906, the original Order in Council of June 8, 1887, was cancelled with a view to the granting of a lease of the property. The Order by which this was done is in the following terms :—

"Extract from a report of the Committee of the Privy Council approved by the Governor-General on the 31st day of August, 1906.

"The Minister of Militia and Defence recommends that the Minute of Council of the 8th June, 1887, empowering the Minister of Militia and Defence of that date to take the necessary steps to hand over to the City of Vancouver for park purposes the military property now known as 'Stanley Park' be cancelled.

"The Minister further recommends that the said property be leased for park purposes for a period of ninety-nine years renewable to six Commissioners, three of whom shall be appointed by the Governor in Council, and three shall be members of the City Council, of whom the Mayor shall be one, and the remaining two selected by the said Council.

"The Minister further recommends that the conditions of said lease be made generally on the lines of those under which the Point Pleasant Park, Halifax, Nova Scotia, has been leased by the Imperial Government to the City of Halifax.

"The Minister further recommends that the three Commissioners to represent the Dominion Government be : Charles

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Dorning, Brewer; Robert Kelly, Merchant; and Fred C. Wade, Barrister.

"The Committee submit the same for approval.

"(Sd.) John J. McGee,

"Clerk of the Privy Council.

"The Honourable

The Minister of Militia and Defence."

Delay arose in settling the form of the lease, but it was finally executed on November 1, 1908. Some dispute has since arisen as to whether the boundaries set out in the lease are not sufficiently wide to include Deadman's Island, but having regard to the fact that in a letter of August 11, 1906, the city clerk had asked that the island should be specifically included in the lease, and to the fact that the lease is silent as to the island and describes the property merely as "that peninsula known as Stanley Park," their Lordships are of opinion that the lease cannot be read as including the island. This was the view taken by two of the three judges in the Court below, and it was not dissented from by the third judge. The lease was for ninety-nine years at a nominal rent of one dollar per annum, and it is to be noted that it is expressed to be made "subject until their determination to any existing leases of portions of the said land." The city then either re-entered the island, or if still in possession they remained there. On June 7, 1909, Ludgate made a formal demand for possession; it was refused; and thereupon the writ in the present action was served.

These being the facts the defendants take up the position that they are in possession, and (as they properly may do) they rely on their possessory title. The question therefore turns entirely upon the strength of the plaintiffs' title. Is it better than the possessory title of the defendants? The plaintiffs' title is to be found in the lease of February 14, 1899, by which Deadman's Island was by name demised to them. If that lease is a good and valid demise it must prevail over the defendants' rights, which rest in mere possession. It was argued for the appellants that it was not a good demise, firstly, because it was not granted under the Great Seal; and, secondly, because it was obtained by "deceit" practised upon the Crown within the

meaning of *Alcock* v. *Cooke*. (1) As to the first of these points it was intimated by their Lordships in the course of the argument that it was not open to the appellants to rely upon it inasmuch as they had never put it forward in the Courts below, although it was open to them to have done so. As to the second point it is perhaps desirable to state the rule of law on which the Court of Common Pleas proceeded in delivering judgment in *Alcock* v. *Cooke*. (1) The rule is a rule of common law by which a grant by the King which is wholly or in part inconsistent with a previous grant is held absolutely void unless the previous grant is recited in it. But the rule is qualified to this extent, that if the subject had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant though void as to the rest. The rule arises out of a duty which the law casts upon the subject of making known any previous inconsistent grant of which he may himself have notice. If he neglect this duty he is held to have deceived the King when accepting the grant made to him, with the result that he takes nothing by his grant. It was sought in the argument to apply this rule to the facts of the present case. It was said that Ludgate knew, or had notice, of the grant to the appellants contained in the Order of Council of June 8, 1887, and the trial judge seems to have taken this view. Their Lordships, however, are of opinion that there is no evidence to support this contention, and they think that the Chief Justice was right in finding as he did that the Court ought not to presume, and could not properly presume, that the plaintiff had either knowledge or notice of the city's alleged rights at the time he obtained his lease, or that he in any way "deceived" the Crown. This being so, the case of *Alcock* v. *Cooke* (1) has no application, and both points are disposed of.

Their Lordships would further add that in their opinion no rights over the island passed to the city under the Order of June 8, 1887, and that even if any such rights did pass, they were destroyed when the Order was cancelled in 1906, from which

(1) 5 Bing. 340.

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date the rights of the parties must be ascertained with reference to their respective leases.

In these circumstances the appeal fails, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Armitage, Chapple & Macnaghten.*
Solicitors for respondents: *Bischoff, Coxe, Bompas & Bischoff.*

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[PRIVY COUNCIL.]

HADDINGTON ISLAND QUARRY COMPANY, LIMITED, AND OTHERS . . . . . } DEFENDANTS;

AND

ALDEN WESLEY HUSON AND OTHERS . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Suit for Redemption of Mortgage—Power of Sale—Duty of Mortgagees—Alleged Inadequacy of Price—Purchasers not charged with Collusion.

The Court of Appeal found that a sale by the assignees of a mortgage in the exercise of a power of sale contained therein was invalid as against the mortgagor plaintiffs and decreed redemption, on the ground that there had been reckless disregard of their interests in the conduct of the sale. It appeared that the pleadings contained no charge of fraud or collusion or bad faith against the defendant purchasers, that there had been no notice before trial that inadequacy of price would be relied upon as evidence thereof, and that the purchasers had accordingly given no counter-evidence of its sufficiency:—

Held, that the finding of the first Court to the effect that the sale was valid and regular ought not to have been reversed, and that the failure in the circumstances of the purchasers to produce counter-evidence did not justify a finding in effect that the sale was fraudulent.

APPEAL from a judgment of the Court of Appeal (January 10, 1911) reversing a decree of Morrison J. (May 7, 1910) which dismissed the respondents' action.

* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, LORD DE VILLIERS, and LORD ROBSON.

The respondents sued to establish their title to redeem a mortgage upon the quarry in suit. The mortgage was dated October 31, 1893, and was made by three of the respondents to Macaulay to secure $3500 and interest at 12 per cent. per annum. In November, 1894, Macaulay assigned the mortgage to the then Chief Commissioner of Lands and Works for the province, whose successor in office on March 11, 1908, assigned it to the appellant company. It did not appear that the consent of the Lieutenant-Governor was obtained for this latter assignment, and in the earlier stages of the litigation it was contended that in its absence the assignment was void.

On May 18, 1908, the appellant company sold the quarry in the exercise of the power of sale contained in the mortgage to the appellant Walker in trust for the remaining appellants other than the company and the trustee.

At the trial some, but not expert, evidence was given as to value, and it was not suggested that the question of value was relied upon as shewing that the sale was not bona fide, and the appellants called no evidence on the point. The respondents relied on s. 44 of the Public Works Act (160 R. S. B. C., 1897) as shewing that the assignment by the Commissioner was invalid, being made without the consent of the Lieutenant-Governor; and on s. 45 as shewing that the action must fail because the Attorney-General for the province was not a party. The appellants contended that the sections only applied to property vested in the Crown under the Act for public purposes and that the quarry was not so vested.

The judge dismissed the suit, holding that the transaction was quite valid and regular.

In their notice of appeal to the Court of Appeal there was no specific allegation that the sale was not for a proper price or was not made bona fide.

The Court of Appeal decreed the suit, holding that on the uncontradicted evidence of one of the respondents the sale was at an undervalue and that there was no due exercise of the power of sale in the mortgage; the Chief Justice observing that the cases shew that the power of sale ought to be exercised with due regard to the mortgagors' interest, and that a sale ought to be

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made in the manner that it would be made by a reasonably prudent man selling his own property.

Sir R. Finlay, K.C., and *Rowlatt*, for the appellants, contended that the evidence shewed that the power of sale was properly exercised. There was no sufficient evidence of a sale at an undervalue, and the point was not taken at the trial, where the appellants could have met it by counter-evidence. To avail the respondents it must be proved that the undervalue was so extreme as to be evidence of fraud or collusion with the purchasers. Otherwise any failure by the assignees of the mortgage in their exertion to obtain the best price would not affect the bona fides of the purchasers without notice of irregularity, if any. Reference was made to *Kennedy* v. *De Trafford* (1), cited in the Court below.

Higgins, for the respondents, contended that the evidence shewed that the appellants recklessly dealt with the property in such manner that the respondents' interests were sacrificed. There ought to have been a demand for payment of the mortgage moneys before the power of sale was exercised, or at least the respondents should have had some opportunity given of satisfying the mortgage. No notice of an intention to sell was given, no evidence of advertisements of sale in the newspapers, or of efforts having been made to secure a fair price, while the respondents shewed by their uncontradicted evidence that the price accepted was grossly inadequate. The appellants were not bona fide purchasers without notice, but were proved to have had full knowledge of all the circumstances leading up to the sale.

Sir R. Finlay, K.C., replied.

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The judgment of their Lordships was delivered by

LORD DE VILLIERS. This is an appeal against a judgment of the Court of Appeal of British Columbia reversing a judgment of Morrison J. in the Supreme Court, which dismissed the plaintiffs' action with costs. The plaintiffs were the mortgagors and personal representatives of mortgagors of a certain quarry

(1) [1897] A. C. 180.

known as Haddington Island, and the defendants were the assignees of the mortgage and purchasers of the quarry, the sale to the latter having been effected by virtue of a power of sale conferred on the mortgagees by the indenture of mortgage. The statement of claim contained several claims, but the claims to which the arguments before their Lordships were mainly directed were for a cancellation of the conveyance to the purchasers, and for a declaration that the plaintiffs were entitled to redeem the mortgage. The grounds upon which these claims were based were that the assignment of the mortgage did not vest in the defendant company any interest in or title to the mortgage, that there had not been a due registration either of the assignment or of the conveyance, that the defendant company had no right to exercise the power of sale, that no demand had been made on the mortgagors for payment and no notice given to them of the intended sale, and that "the defendant company did not use its best exertions, or indeed any exertions, to obtain the best price for the said Haddington Island alleged to have been sold by it as aforesaid, and that the purchase price alleged to have been paid by the defendant Walker or the defendants Macdonald, Wilson, and Snider, was a very inadequate price for the said property." At the close of the trial the learned judge made the following observations:—"The whole transaction, it seems to me, has been quite valid and regular, and you cannot disturb the defendants. But I have some misgivings as to the assignment to Fulton. Outside of that, I would not hesitate to give judgment. I think the sale was valid, and the other points I am satisfied on, but I have some misgiving on that point." There is an obvious misprint, as the assignment, the validity of which is denied, was made *by* and not *to* Fulton, who was Commissioner of Lands. The mortgagee was one Macaulay, who had assigned the mortgage to a previous Commissioner of Lands, and the point now made by the plaintiffs was that the title to the mortgage did not vest in the defendant company as assignee, inasmuch as the Commissioner had not obtained the authority of the Lieutenant-Governor in Council to assign the bond. The judge, after considering the question, decided that it could not be raised without making the

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Attorney-General a party. He accordingly dismissed the action with costs. On appeal to the Court of Appeal, the Chief Justice and Martin J. confined themselves entirely to the question whether the sale had been made by the defendant company with due regard to the interests of the mortgagors. Galliher J. also discussed that question, but he made a few observations upon another question raised in the Court of Appeal, namely, whether an arrangement made before the date of the assignment by the Government with the mortgagors, under which the Government was to receive the royalty due to the mortgagors on stone taken from the quarry and apply the same in reduction of the debt, would have debarred the Government from exercising the power of sale. If the Government had no right to sell the property, the assignees would be equally debarred from selling it. Upon this point the learned judge said: "Taking all the arrangements which finally culminated in the agreement of July 12, 1894, and reading that agreement, it appears to me it goes no further than to provide for an application of the royalty on such stone as should be supplied thereunder on the mortgage. This was done, and although we find a credit for stone supplied for the Empress Hotel, I treat that merely as a sum received and applied in due course on the mortgage. This was the last credit given, and is some two years before the mortgage was assigned to the defendant company, so that, even if that is treated as a payment under a special agreement, the mortgagors were for a long time subsequent thereto in default, and the Government could deal with the mortgage as they saw fit, due regard being had to the interest of the mortgagors. Their assigns could, of course, do likewise." He agreed, however, with the other members of the Court of Appeal that the sale had not been made with due regard to the interests of the mortgagors, and the sale was accordingly ordered to be set aside and the plaintiffs were allowed to redeem.

Their Lordships entirely agree with the view that what took place between the Government and the mortgagors before the assignment was not sufficient to deprive the assignees of the right to exercise the power of sale contained in the indenture. The real question, therefore, to be decided in this appeal is

whether, in view of the pleadings and of the evidence given at the trial, the Court of Appeal rightly decided that there was such a reckless disregard of the interests of the mortgagors as would justify the setting aside of the sale.

The parties against whom the action was brought were not only the assignees of the mortgage, but also the purchasers of the property. The sale was effected by virtue of a power which is in the following terms: "If the mortgagors make default as to any of the covenants or provisoes herein contained, the principal hereby secured shall, at the option of the mortgagee, his heirs or assigns, forthwith become due and payable, and in default of payment the powers of sale hereby given may be exercised. Provided that the said mortgagee, on default of payment for one month, may, on one month's notice, enter on and lease or sell the lands. And provided also that, in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said powers of leasing or selling or any of them may be acted upon without any notice . . . . Provided that, in default of the payment of the interest hereby secured, the principal hereby secured shall become payable." Ostensibly, therefore, the mortgagees acted within their powers in selling the property, and the purchasers are entitled to the full benefit of their purchase unless it be alleged and proved that they acted in collusion with the vendors, or that the price was so low as in itself to be evidence of fraud or collusion. Unfortunately, from first to last there is no allegation in the statement of claim charging the purchasers with fraud or collusion or bad faith or knowledge of the existence of facts which would invalidate the sale. The allegations that the defendant company, that is to say, the vendors, did not use any exertions to obtain the best price for the land, and that they sold it to the purchasers at a very inadequate price, are quite consistent with perfect good faith on the part of the purchasers, and yet these are the only allegations from which it could possibly have been inferred that at the trial attempts would be made to charge them with collusion or want of good faith. At the trial the evidence was mainly directed towards establishing those grounds of claim which have since been practically abandoned. Incidentally,

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Alden Huson, one of the plaintiffs, was asked what the value of the property was, and his answer was: "Well, it is worth at least $20,000, at the very least. We were offered $30,000 for it once." As this amount is far in excess of the price for which the property was sold, namely, $3250, it is contended that the sale should not be allowed to stand, but, in the absence of any notice to the defendants that the alleged inadequacy of price would be relied upon as proof of fraud or collusion on their part, they should not be prejudiced by their failure to produce counter-evidence as to value. The evidence as to value given on behalf of the plaintiffs was of the most flimsy nature. Huson said that they had been offered $30,000 for the quarry, but did not produce the person who had made the offer. Nor did the plaintiffs produce any expert, or indeed any other, evidence in support of Huson's casual statement as to value. If the property was so valuable early in 1908, there is no satisfactory explanation why it was not sold and the proceeds of the sale applied towards redemption of the mortgage. It is clear from the correspondence that as far back as January, 1908, Huson knew that there was a prospect of the property being immediately sold for the amount of the original mortgage debt, but, although he protested against such a sale, he made no attempt to find the means of paying the Government the sum of $1150, which was all that was then still owing for principal and interest. Under the indenture of mortgage the mortgagors were at liberty to pay the debt after three months' notice in writing to the mortgagee or his assigns, or upon the payment of three months' interest in lieu of notice. No such notice appears to have been given, nor interest tendered either to the Government or to the defendant company after it had, in March, 1908, obtained from the Government an assignment of the mortgage. The defendant company accordingly sold the property for $3250, and it now holds the balance, after payment of capital and interest, at the disposal of those entitled thereto. The trial judge was perfectly satisfied as to the validity of the transaction. In the notice of appeal to the Court of Appeal, although other grounds of alleged invalidity are fully stated, not a word is said as to fraud or collusion, but the Court held, in effect, that the sale was fraudulent. Among the

cases cited by Galliher J. was that of *Warner* v. *Jacob* (1), where Kay J., summing up the authorities, is reported to have said: "The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his mortgage debt. If he exercises it bona fide for that purpose, without corruption or collusion with the purchaser, the Court will not interfere, even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud." In the present case the statement of claim alleged, in effect, that the sale was very disadvantageous, but it gave no hint to the defendants that they would be called upon at the trial to meet a charge of either corruption or collusion, or to meet the case that the price was so low as in itself to be evidence of fraud. Under these circumstances, their Lordships are unable to attach the same importance as was attached by the Court of Appeal to the circumstance that the defendants produced no evidence as to the value of the property, nor are they prepared to dissent from the finding on the facts by the learned judge at the trial. They will therefore humbly advise His Majesty that the judgment of the Court of Appeal should be reversed and the judgment of Morrison J. restored. The respondents will bear the costs of this appeal and the costs incurred in the Court of Appeal and the Supreme Court.

Solicitors for appellants: *Gard, Rook & Co.*

Solicitors for respondents: *Maddison, Stirling, Humm & Davies.*

(1) (1882) 51 L. J. (Ch.) 642.

[PRIVY COUNCIL.]

J. C.* 1911 July 7, 27.

AGNES ALLARDICE AND ANOTHER . . . . DEFENDANTS;

AND

ELIZABETH ALLARDICE AND OTHERS . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand Family Protection Act, Part II. (No. 60 of 1908), s. 33 (1.)—Discretion of the Court not interfered with—Provision ordered for Testator's Married Daughters.

New Zealand Family Protection Act, Part II. (No. 60 of 1908), s. 33 (1.), provides that in cases where any person dies leaving a will without making adequate provision therein for the proper maintenance and support of the testator's wife, husband, or children the Court may, at its discretion, order that such provision as it thinks fit should be made out of the estate of the testator for such wife, husband, or children.

The Court below having exercised its discretion in favour of three married daughters of the testator by a wife who had divorced him, his will disposing of all his estate in favour of his second wife and her children, their Lordships declined to interfere; and approved the general view taken by the Court below as to the proper scope and application of the powers conferred by the Act.

APPEAL from an order of the Court of Appeal (July 27, 1910) varying an order of Chapman J. (December 18, 1909).

These orders were made on an application on the part of the respondents against the appellants (executors and trustees of the will of James Allardice). The object was to obtain under the Family Protection Act, 1908 (New Zealand Act No. 60 of 1908), s. 33, sub-s. 1, such provision for the plaintiffs or some of them as to the Court should seem fit out of the testator's estate.

In 1892 and 1905 the respondent Elizabeth Allardice obtained first a judicial separation and afterwards a divorce from her husband, the testator, and an order that payment of 120*l.* a year should be secured to her for life. In 1906 the testator married the appellant Agnes Allardice and had seven children by her, six born before marriage and one afterwards. He died in 1908,

* *Present:* LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD MERSEY, LORD DE VILLIERS, and LORD ROBSON.

leaving six children by the first wife, namely, three married daughters who appeared as respondents, a fourth married daughter who did not claim, and two sons.

Chapman J. said with regard to the three respondents who appeared to this appeal: "The circumstances of these ladies are anything but flourishing, but they are all married to men of some capability all of whom are able to work. Whatever may be said of their position and means it is certain that were Allardice living they would have no legal claim on him to contribute to their support. It may also fairly be said that they are living by means of the earnings of their husbands just as the wives of a vast number of mechanics, small shopkeepers, clerks, shop hands and others are living in every part of New Zealand, from whose position theirs only differs in respect of the unjust testamentary treatment they have received from a wealthy father." In considering whether they were entitled to the benefit of the Act the judge said: "What I really have to consider in this case is whether the Act has any application whatever to . . . . married daughters who never have been dependent on their father since they were married and whose husbands are capable of supporting them in the future as they have supported them in the past. In determining this question, I must take my guidance exclusively from the statute . . . . This claim relates to children, but in what sense does the statute refer to children? I can only conceive that it refers to children for whose proper support there is at the time of the testator's death no adequate provision . . . . Here however none of the daughters approach a condition that can properly be called want. All that can be said is that even a small allowance would increase their comfort in life and that they have been treated with unmerited neglect."

The Court of Appeal (see 29 N. Z. L. R. 969) allowed the claim of the above-mentioned respondents, but dismissed it by implication as regards the two sons. The order of the Court was that 60*l.* a year should be allowed to one of the respondents during her life without power of anticipation, and that 40*l.* a year should be allowed to each of the other two during their respective lives without power of anticipation; that such annual sums should run as from the testator's death; and that a competent

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part of the testator's estate should be settled to secure payment of the said annual sums.

Stout C.J. said that many cases had been decided by the Supreme Court under the Acts prior to the Act of 1908—which is a statute consolidating in Part I. the Family Homes Protection Act, 1895, No. 20, and in Part II. the Testator's Family Maintenance Act, 1906, No. 59—and that the rules laid down in those cases might be summarized as follows:—(1.) "That the Act is something more than a statute to extend the provisions in the Destitute Persons Act." (2.) "That the Act is not a statute to empower the Court to make a new will for the testator." (3.) "That the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of 'wife, husband, or children' where adequate provision has not been made for their proper maintenance and support by the will of the testator." (4.) "That in the case of a widow, at all events, if not in the case of a widower, the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves."

With respect to the question when children should be given "maintenance and support," the Chief Justice observed that the Act had laid down no rule for guidance, but had left the matter entirely to the discretion of the Court. The Court had to consider first what means the children had.

"'Support,' it has been held," said the learned Chief Justice, "at all events in the case of a widow, does not mean merely having a supply of food and clothing. It means, it has been held, such kind of maintenance as the widow during the life of her husband has been accustomed to. The matter that should be considered, both as to widow and children, is how she or they have been maintained in the past. A child, for example, that has been living on a father's bounty could not be expected to begin the battle of life without means. A child, however, who had maintained her or himself, and had perhaps accumulated means, might well be expected to be able to fight the battle of life without any extraneous aid. But even in such a case, if the fight was a great struggle, and some aid might help, and the

means of the testator were great, the Court might, in my opinion, properly give aid. The whole circumstances have to be considered. Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support; and the second, what property has the testator left."

Austen-Cartmell and *Sharp*, for the appellants, contended that the Act of 1908 did not apply to the case of a married daughter of the testator who at the date of his death was not dependent upon him for her maintenance and support and was being properly maintained and supported by her husband. It only applied to children for whose proper maintenance and support there was at the time of the testator's death no adequate provision. Each of the respondents was being properly maintained and supported by her husband; and the Court in exercising its discretion under the Act should consider the circumstances of each applicant as the same existed before and at the date of the testator's death, and ought not to have regard to uncertain or remote contingencies.

Myers and *Butterworth*, for the respondents, were not heard.

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July 27.

The judgment of their Lordships was delivered by

Lord Robson. This case arises under the New Zealand Family Protection Act, Part II. (No. 60 of 1908), which provides that in cases where any person dies leaving a will and without making adequate provision therein for the proper maintenance and support of his wife, husband, or children, the Court may, at its discretion, order that such provision as it thinks fit should be made out of the estate of the testator for such wife, husband, or children.

The appellants are the executors and trustees of the will of the late James Allardice, the first appellant, Agnes Allardice, being his widow. The first respondent, Elizabeth Allardice, was the first wife of the testator, James Allardice, and was divorced from him on her own petition in the year 1905. The remaining

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respondents are the three daughters and two sons of the testator by his first wife, Elizabeth. The testator married his second wife on February 4, 1906, and five days afterwards made his last will, whereby he left the whole of his estate on trust for the sole benefit of his second wife and her children.

He had begun life as a labourer, but at the time of his death owned property producing a net income of some 600*l.* a year, and estimated to be of a capital value of between 20,000*l.* and 30,000*l.*

So far as his first wife was concerned, a proper maintenance was secured to her for life by the decree in the divorce proceedings. The three daughters had married persons in a humble station of life with very small and precarious incomes, and the two sons were able-bodied men, capable of maintaining themselves in the future as they had done for some years before their father's death.

Under these circumstances the trial judge, Chapman J., was of opinion that the claim put forward by the respondents wholly failed. An appeal was thereupon made to the Court of Appeal, who decided that the sum of 60*l.* a year should be paid out of the estate of the testator to one daughter and 40*l.* a year to each of the other two daughters during their lives.

Their Lordships see no ground upon which it can be said that the Court of Appeal have not properly exercised the discretion with which they are entrusted. It would serve no useful purpose to go again over the matters of fact so carefully analysed by the learned judges of the Courts below, or to deal in detail with the circumstances and condition in life of each claimant. These are essentially questions for the discretion of the local Courts who are entrusted with the administration of the Act. They are well acquainted with all the local conditions as to employment, standard of living, and other matters necessary to be borne in mind in adjudicating on questions of this class, and their Lordships would be slow to advise any interference with the discretion founded upon such knowledge. Nor do they see any reason to differ from the learned judges of the Court of Appeal in the general view they take as to the proper scope and application of the powers conferred upon them by the Act.

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Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs. As regards the petition for special leave to appeal from the order of the Court of Appeal imposing certain conditions upon granting leave to appeal, under the circumstances it is unnecessary to advise His Majesty to make any order. The costs of that petition will be costs in the appeal.

Solicitors for appellants: *Minet, May & Co.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

FEDORENKO . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Extradition—R. S. C., 1906, *c.* 155, *s.* 10—*Proof of Requisition not a Condition of Arrest or Committal.*

Under art. IX. of the Extradition Treaty with Russia, 1886, after a requisition in due form it is obligatory on the authorities to arrest the fugitive. The article does not provide that there shall be no arrest till after requisition; and is not inconsistent with s. 10 of the Extradition Act (R. S. C., 1906, c. 155).

APPEAL by special leave from a judgment of Robson J. (December 17, 1910) discharging the respondent under a writ of habeas corpus from custody under the Chief Justice's warrant of committal with a view to his extradition to Russia.

The question raised was whether it is necessary in extradition

* *Present:* EARL LOREBURN L.C., VISCOUNT HALDANE, LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD DE VILLIERS, and LORD ROBSON.

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proceedings to put in evidence the requisition by the foreign State requiring the extradition before the judge to whom application for a warrant is made.

R. S. C., 1906, c. 155 (the Extradition Act), provides in s. 10: "Whenever this part applies, a judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him, and on such evidence or after such proceedings as in his opinion would, subject to the provisions of this part, justify the issue of his warrant if the crime of which the fugitive is accused, or of which he is alleged to have been convicted, had been committed in Canada . . . ."

On November 24, 1886, a treaty for the mutual surrender of fugitive criminals was signed between Great Britain and Russia containing the following articles:—

Art. VIII. "The requisition for extradition shall be made through the diplomatic agents of the High Contracting Parties respectively.

"The requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority of the State requiring the extradition, and by such evidence as, according to the laws of the place where the accused is found, would justify his arrest if the crime had been committed there. . . . ."

Art. IX. "If the requisition for extradition be in accordance with the foregoing stipulations, the competent authorities of the State applied to shall proceed to the arrest of the fugitive."

The requisition in this case was made on May 7, 1909, by the Russian Consul for the Dominion on the Minister of Justice for the Dominion. On September 26, 1910, the Chief Justice of Manitoba, sitting as judge under the Extradition Act, issued a warrant for the arrest of the respondent, based upon a sworn information of the police officer. Evidence in support of a charge of murder was adduced and the Chief Justice issued his warrant of committal dated October 18, 1910. It was not proved that any requisition for his arrest had been made in accordance with art. VIII. of the treaty. Robson J. held that the absence of proof of requisition having been made under

arts. VIII. and IX. of the treaty invalidated the warrant of committal, and discharged the respondent from custody. His judgment was as follows: "My view of the matter is that to proceed under s. 10 without observing the provisions of art. IX. of the treaty would be to contravene the arrangement. In other words the treaty says that if the requisition be in accordance with certain stipulations, then the proper or competent authorities shall proceed to the arrest of the fugitive, and s. 3 says the treaty must not be contravened. Each of the High Contracting Parties has indicated to the other the manner in which it wishes the arrangement to be carried out. It may be a matter of policy with the demanding State that applications shall not be permitted on its behalf, unless evidenced in a defined manner. It would seem to be the duty of the 'competent authorities' of the State applied to to see that the requisition is in accordance with the stipulations of the treaty before proceeding to the arrest of the fugitive. The 'competent authorities' in Canada are those named in the Extradition Act, i.e., the persons authorized to act judicially in extradition matters. They must not only see that there is a requisition, but also see that it complies with art. VIII. of the treaty."

Sir R. Finlay, K.C., Newcombe, K.C., and *Theobald Mathew*, for the appellant, contended that proof of a diplomatic requisition was not necessary as a preliminary to arrest under the Extradition Act. Sect. 10 of the Extradition Act is not in contravention of the treaty of November 24, 1886, which authorizes the issue of a warrant on an information without any reference to the requisition. The duty of the judge is to follow the direction of the Act, which does not make either arrest or committal dependent on a preliminary requisition. Reference was made to *Re Lazier* (1) and *In re Counhaye* (2), a judgment of Blackburn J.

The respondent did not appear.

The judgment of their Lordships was delivered by

EARL LOREBURN L.C. The only question in this appeal is whether the absence of a requisition by the Russian Government

(1) (1899) 30 O. R. 419; 26 A. R. 260. (2) (1873) L. R. 8 Q. B. 410.

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for extradition vitiated the proceedings under which this accused was arrested and committed for surrender.

Robson J. held that these proceedings should be founded upon a certain preliminary requisition, and that therefore, as there was not such a preliminary requisition, the accused should be discharged. His reason was that upon his construction of the treaty with Russia this condition had to be complied with, and that in so far as the Canadian Extradition Act (c. 155 of the Revised Statutes, 1906) was inconsistent with that treaty the treaty must prevail.

Their Lordships are of opinion that what was done in the arrest and committal was in accordance with s. 10 of the Extradition Act, and that there is no inconsistency between the Act and the treaty. The treaty provides by art. IX. that, after a requisition in due form, the authorities of the State applied to shall proceed to the arrest of the fugitive. In that case the proceeding to arrest is obligatory. The article does not provide that there shall be no arrest till after a requisition.

Their Lordships desire to say that nothing has come before this Board except this point of law. The other rights of the accused and of the State remain wholly unaffected.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the order of Robson J., dated December 17, 1910, should be discharged.

Solicitors for appellant: *Charles Russell & Co.*

[PRIVY COUNCIL.]

CANADIAN NORTHERN RAILWAY COMPANY . . . . . } DEFENDANTS;

AND

THOMAS D. ROBINSON AND ANOTHER . . . PLAINTIFFS.

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July 13, 20, 27.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canadian Railway Act, 1903, *ss.* 42, 242—*Action for Damages—Removal of a Siding constructed for Convenience of Traffic—Limitation—Railway Board's Finding of Fact conclusive.*

The appellant company having constructed a spur track or siding into the respondents' yard for the convenience of traffic, in November, 1904, cut it off, and on February 19, 1906, the Board of Railway Commissioners, under ss. 214 and 253 of the Dominion Railway Act of 1903, directed its restoration, which was carried out on September 28, 1906. In an action for damages for breach by the appellants of their statutory obligations between October 31, 1904, and September 28, 1906:—

Held, that under s. 42 of the Act of 1903 the order of the Board, affirmed as it was by the Supreme Court on appeal, was conclusive as to the question of fact, that the facilities previously enjoyed by the respondents were of a kind to which they were entitled.

Held, also, that the special provisions of the Act as to one year's limitation (see s. 242 substantially re-enacted by s. 306 of the Railway Act of 1906) relate to damages sustained by the construction or operation of the railway and do not apply to the refusal of facilities by means of a siding outside the railway as constructed, which is not an act done in the operation of the railway.

APPEAL by special leave from a judgment of the Supreme Court (June 15, 1910) affirming a judgment of the Court of Appeal for Manitoba (January 17, 1910) which affirmed a judgment of Metcalfe J. (September 16, 1909).

The action was brought by the respondents under the circumstances stated in their Lordships' judgment and in the head-note above to recover damages for not affording the respondents reasonable and proper facilities for receiving, forwarding, and delivering of traffic upon the railway of the appellants. The judgment of Metcalfe J. was that they should recover the amount

* *Present:* VISCOUNT HALDANE, LORD MACNAGHTEN, LORD SHAW OF DUNFERMLINE, LORD DE VILLIERS, and LORD ROBSON.

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of all loss or damage suffered by them by reason of the neglect and failure to supply such facilities from October 31, 1904, to September 28, 1906; and that the action was not barred by s. 242 of the Railway Act of 1903 (s. 306 of the Act of 1906).

The Supreme Court by a majority of three to two affirmed the judgments of the Courts below. The minority held that the action was barred by s. 242 on the following grounds as stated in the judgment of Davies J., which, in reference to the appellants' acts complained of by the respondents, said:

"They are acts which, in my opinion, are covered by the language of the section above quoted. They are 'damages sustained by reason of the operation of the railway.' I construe the words to mean and include not only the actual physical operation of the railway causing injury or damage, but the manner of operation, wrongful, illegal, or improper. There can, perhaps, be no better example of my meaning than the concrete case we have before us.

"The railway was operated at the point in question in connection with a private siding on plaintiffs' lands over which their goods were carried to and from their warehouse. The defendant company removed that siding, and for nearly two years refused to restore it. They operated the road during those two years without giving plaintiffs that which they had a right to have, namely, the track facilities. The plaintiffs applied to the Railway Board to have the siding facilities restored, which, as they allege, had been 'wrongfully taken away.' The Railway Board having, as was maintained by this Court, jurisdiction in this matter, held that such sidings and connections 'and the privilege of loading cars and delivering goods for carriage on such siding, and of receiving and unloading goods by means thereof, were facilities within the Act,' and after reciting the circumstances connected with their removal held that 'under all these circumstances the discontinuance of the former service seems to the Board to have been unreasonable.' They accordingly ordered their restoration."

Sir R. Finlay, K.C., *O. H. Clark, K.C.*, and *Tyrrell J. Paine*, for the appellants, contended that no action lay either before or

after the order made by the Board of Railway Commissioners on February 19, 1906. Before that order the appellants were not under any statutory obligation to afford those facilities for traffic of the deprivation of which the respondents complained, for the breach of which an action would lie. No action would lie at common law, and the statute did not give one. There was no breach of any duty until that order had been made, and in any event an action would only lie for damages subsequent to that order. Reference was made to ss. 23, 35, 36, 42, 214, 242, 253, and 294 of the Railway Act of 1903, the corresponding sections to which in the Act of 1906 (see R. S. C., 1906, c. 37) are ss. 26, 46, 47, 54, 284, 306, 317, and 427, and to *Denaby Main Colliery Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1), a decision upon s. 2 of the Railway and Canal Traffic Act, 1854, and *Perth General Station Committee* v. *Ross.* (2) With regard to the limitation sections above cited it was contended that this action was barred by s. 242 of the Act of 1903, and reference was made to *Holland* v. *Northwich Highway Board* (3) and *Davis* v. *Curling.* (4) Sect. 42 of the Act of 1903 did not apply to this case, for the finding by the Board that the respondents had been deprived of reasonable facilities was not a finding of fact within the meaning of that section.

Nesbitt, K.C., and *Hudson*, for the respondents, contended that the decision of the Railway Board on February 19, 1906, that the plaintiffs had been deprived of reasonable facilities for traffic which the defendants were bound to restore was final between the parties and related back to the time of the application. The application was made under ss. 214 and 253 of the Act of 1903, authority to decide was given to the Board by sub-s. 2 of s. 253, and s. 42, sub-s. 3, provides that the finding of the Board on any question of fact shall be binding and conclusive on all Courts. And the jurisdiction of the Board, which under s. 8 of the said Act is a Court of record, was affirmed by the Supreme Court. The Board, however, had no power to award damages: see *Duthie* v. *Grand Trunk Railway* (5); differing in that respect from the

(1) (1885) 11 App. Cas. 95, 111.
(2) [1897] A. C. 479, 488.
(3) (1876) 34 L. T. 137.
(4) (1845) 8 Q. B. 286.
(5) (1905) 4 Can. Ry. Cas. 304.

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Railway and Canal Commission in England, which under s. 12 of the Railway and Canal Traffic Act, 1888, c. 25, s. 12, has the power of awarding damages expressly given to it. But s. 294 of the Railway Act of 1903 expressly gives a right of action, and the plaintiffs were entitled to damages as from October 31, 1904, and at the least from the date of their application to the Board on September 15, 1905, until September 29, 1906, the date when the order of the Board that the traffic facilities should be restored was complied with. Reference was made to *Bell* v. *Midland Ry. Co.* (1); *Laird* v. *Birkenhead Ry. Co.* (2); *Portway* v. *Colne Valley and Halstead Ry. Co.* (3); *City of Dublin Steam Packet Co.* v. *Midland Great Western of Ireland Ry. Co.* (4) With regard to the distinction between misfeasance and nonfeasance reference was made to *Sanitary Commissioners of Gibraltar* v. *Orfila* (5); *McArthur* v. *Northern and Pacific Junction Ry. Co.* (6); *Zimmer* v. *Grand Trunk Ry. Co. of Canada* (7); *North Shore Ry. Co.* v. *McWillie* (8); *Findlay* v. *Canadian Pacific Railway.* (9)

As regards limitation s. 242 of the Act of 1903 and s. 306 of the Act of 1906 do not extend to omissions as well as commissions. The injury complained of does not come within the words "construction or operation." Those words apply only to rights of action arising under matters dealt with in the Act under those headings. The damage in this case arises from breach of an implied contract from user relating to the carriage of traffic. Reference was made to *Hammersmith, &c., Ry. Co.* v. *Brand* (10) and *Toronto Corporation* v. *Toronto Railway.* (11)

Sir R. Finlay, in reply, besides referring to the cases cited by the respondents, cited *Grand Trunk Ry. Co. of Canada* v. *Perrault* (12) and *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada.* (13)

(1) (1859) 3 De G. & J. 673.
(2) (1859) 29 L. J. (Ch.) 218.
(3) (1891) 7 Ry. & Ca. Tr. Cas. 102.
(4) (1891) 8 Ry. & Ca. Tr. Cas. 1.
(5) (1890) 15 App. Cas. 400.
(6) (1890) 17 Upper Can. App. Rep. 86.
(7) (1892) 19 Upper Can. App. Rep. 693, 702.
(8) (1890) 17 Can. S. C. R. 511.
(9) (1901) 2 Can. Ry. Cas. 380.
(10) (1868) L. R. 4 H. L. 171.
(11) [1907] A. C. 315.
(12) (1905) 36 Can. S. C. R. 671.
(13) [1907] A. C. 65.

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Canada, which, by a majority of three to two, dismissed an appeal from an order of the Court of Appeal for Manitoba. This order dismissed the appeal of the appellants against a judgment of Metcalfe J. awarding damages to the respondents for the neglect and failure of the appellants between October 31, 1904, and September 28, 1906, to supply proper facilities for receiving, forwarding, and delivery of traffic upon the railway of the appellants.

In 1888 one of the respondents established a fuel business in Winnipeg, on premises adjoining the railway, which then belonged to the Northern Pacific and Manitoba Railway Company, and that company, at his request, constructed a spur track or siding into his yard for his convenience. A lumber business was subsequently added to the fuel business, and this enlarged business was from 1903 onwards carried on by the respondents in partnership. The railway company worked the siding, which does not appear to have been constructed on the terms of any express agreement, till 1901, when the railway became vested in the appellants. On June 12, 1904, the appellants gave notice to discontinue the facilities afforded by the siding, and in November in that year cut it off. The respondents in 1905 commenced proceedings before the Board of Railway Commissioners for Canada for restoration of the facilities which the siding afforded, and on February 19, 1906, the Board made an order directing the appellants to restore these facilities at the expense of the respondents, and without prejudice to the right of the appellants to expropriate them. On appeal to the Supreme Court of Canada the order was affirmed. Meantime, on September 22, 1906, another order was made by the Board further defining the facilities to which the respondents were entitled, and the order was carried into effect.

The respondents in October, 1908, commenced an action in the Court of King's Bench in Manitoba, claiming damages for the temporary deprivation of the facilities. Metcalfe J. decided in their favour, and directed a reference as to the amount of damage suffered.

The order of the Board deciding that the respondents were

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entitled to the facilities in question, and that they had been unreasonably deprived of them, was made under ss. 214 and 253 of the Railway Act of Canada, 1903. Sect. 214 provides in effect that a railway company is to furnish at all stopping places established for the purpose accommodation for the receiving and loading of traffic offered for carriage and shall carry such traffic. Sect. 253 provides that the company is to afford all reasonable and proper facilities for receiving, forwarding, and delivering traffic. Sub-s. 2 of this section also provides that the Board may determine as a question of fact whether the company has complied with this provision. By s. 42 the decision of the Board on any question of fact is made conclusive in all Courts. Sect. 294 provides that the company doing or causing, or permitting to be done, any matter, act, or thing contrary to the provisions of the Act, or to the orders or directions of the Governor in Council or the Board or minister made thereunder, or omitting to do any matter, act, or thing required to be done on the part of the company, is to be liable to any person injured thereby for the full amount of damages sustained by reason of such act or omission. Sect. 242 provides that all actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or if there is continuation of damage within one year next after the doing or committing of such damage ceases. Sub-s. 2 of the same section declares that nothing in s. 242 shall apply to any actions brought against the company upon any breach of contract, express or implied, in the carriage of any traffic, nor to any action against the company for damages under any section of Part XI. of the Act respecting tolls. By s. 306 of the Railway Act of 1906 the provisions of s. 242 of the Act of 1903 were re-enacted substantially in the same words, excepting that for the concluding words of sub-s. 2, "any section of Part XI. of this Act respecting tolls," the words "the following provisions of this Act respecting tolls" were substituted.

The first question on the present appeal is whether the action was barred by the special limitation provisions, just quoted, as not having been brought within one year either of the original

act of discontinuance of facilities, or even of the order of the Board declaring the respondents' title. If not barred by these special provisions it is common ground that the action is barred by no other statute of limitations. In the opinion of their Lordships the special provisions do not apply. They are confined to damages or injury sustained by reason of the construction or operation of the railway. The words of exception in the subsection relate to carriage of traffic and to tolls, and do not require any construction which extends the meaning of the phrase "operation of the railway." Such operation seems to signify simply the process of working the railway as constructed. The refusal or discontinuance of facilities for making a siding outside the railway as constructed and connecting it with the line does not appear to be an act done in the course of operating the railway itself. Their Lordships have examined the Railway Act as a whole, and they are of opinion that the special provisions for limiting the time of bringing actions of certain classes to a period of one year from the origin of the cause of action do not apply to a case of refusing or discontinuing facilities such as the present.

The next question is whether there has been such a breach of the statutory obligation to afford reasonable and proper facilities for receiving, forwarding, or delivering traffic upon or from the railway. On this point their Lordships think that the order of the Railway Board, affirmed as it was on appeal, is, under s. 42, conclusive as to what was really a question of fact, the question whether the facilities which the respondents used to enjoy of sending and taking delivery of traffic over a spur track not forming part of the railway itself, but allowed to be connected, were facilities of a kind to which the respondents were entitled. It appears to them that the order of the Board did not originate this right, but recognized it as already existing. This appears to be the effect of sub-s. 2 of s. 253. The result is that their Lordships are of opinion that the judgments in the Courts below were right, and they will humbly advise His Majesty that this appeal should be dismissed with costs as between solicitor and client.

Solicitors for appellants: *Linklater, Addison & Brown.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

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June 30; *July* 27.

IDROOS LEBBE MARICAR ABDUL AZEEZ . PLAINTIFF;

AND

MOHAMED ISMAIL ABDUL RAHIMAN MUDLIYAR . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon Ordinance 22 *of* 1871, *s.* 4—*Possessory Action—Ouster of Trustee of a Mosque—Decree for Restoration of Possession without Proof of Title.*

Under Ceylon Ordinance 22 of 1871 a trustee of a mosque in possession for more than the requisite year and a day is entitled to bring a possessory action as a remedy for forcible dispossession.

APPEAL from a judgment of the Supreme Court (November 26, 1909) reversing a judgment of the District Court of Colombo (December 9, 1908).

This was a possessory action under Ordinance No. 22 of 1871, and was instituted by the plaintiff as trustee of the Maradana mosque in Colombo, he having been for more than a year and a day in possession thereof and having been ousted by the four defendants.

The 4th section of the Ordinance is as follows: "It shall be lawful for any person who shall have been dispossessed of any immovable property otherwise than by process of law, to institute proceedings against the person dispossessing him at any time within one year of such dispossession. And on proof of such dispossession within one year before action brought, the plaintiff in such action shall be entitled to a decree against the defendant for the restoration of such possession without proof of title. Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases."

Rules and regulations for the management of the mosque were adopted by the congregation at a public meeting (at which

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, and LORD SHAW OF DUNFERMLINE.

the appellant was present) held on October 10, 1902; and in pursuance thereof the appellant was at a meeting held on June 19, 1903, duly appointed trustee for a period of five years expiring on June 18, 1908.

The appellant was reappointed trustee before the expiration of the term and remained in undisturbed possession until the ouster complained of, which took place on June 21, 1908.

The respondent's case was that he had been appointed trustee at a meeting on June 5, 1908, for a period of five years from the expiration of the appellant's term, but the appellant denied the validity of the appointment, the meeting having been convened for a different purpose.

The District Judge held that the appellant's possession was of such a character as to sustain a possessory action, and decreed that the respondent should deliver up the keys of the mosque to the appellant without prejudice to the respondent's right of access to the mosque for purposes of worship, and no order was made against the other defendants, who denied that they were in possession.

The Supreme Court held that a possessory action was not available to the appellant, but gave him the option of converting his action into one rei vindicatio and of proceeding with it in that form so as to have the real question at issue between the parties, namely, as to whether the appellant or respondent was the duly constituted trustee under the said rules and regulations, decided.

The material passage in the judgment of Hutchinson C.J. was as follows: "The Roman-Dutch law requires the plaintiff in a possessory action to have had quiet and undisturbed possession for a year and a day; and the requisites of 'possession' are the power to deal with the property as he pleases, to the exclusion of every other person, and the animus domini, i.e., the intention of holding it as his own. Possession must be based both on intention and on physical occupation; but the occupation may be through an agent."

With regard to the character of the appellant's possession the judgment proceeded: "The rules under which he held provide in two places for the event of the dismissal of the trustee,

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without saying anything as to the circumstances under which he may be dismissed. Perhaps the intention of the parties was that the trustee, if he duly performed all the duties of the office, should be entitled to hold it during the term for which he was appointed; just as a manager of a business appointed by a merchant for a definite term may be entitled to hold the appointment for the whole of the term if he performs his part of the bargain. But even so, I think that his possession is only that of those who appointed him, and who have, in some circumstances at any rate, the power to dismiss him, just as the possession of business premises by the manager of the business is that of his employer. His position was very like that of the plaintiff in *Alim Saibo* v. *Cadersa Lebbe* (1), the decision in which seems to me to be in accordance with the Roman-Dutch law. My opinion is, therefore, that the plaintiff was not the owner of the mosque against all the world during the term of his trusteeship, but only the agent for certain purposes of the congregation who had appointed him, and who might under some circumstances have dismissed him."

Sir R. Finlay, K.C., *Dornhorst, K.C.*, and *F. H. M. Corbet*, for the appellant, contended that the possessory action was competent. There was proof of possession for a year and a day before ouster. On that the appellant was entitled to be restored to possession. The case of *Changarapilla* v. *Chelliah* (2), which approved *Ahamado Lebbe* v. *Semberem* (3), was rightly decided and was followed in *Sivapragasam* v. *Ayar*. (4) The Supreme Court was wrong in entering upon an investigation of the title of the parties. Sect. 4 of the Ordinance renders proof of title unnecessary. The appellant was trustee in possession; the respondent, whatever his title, was a wrong-doer.

P. O. Lawrence, K.C., and *H. E. Miller*, for the respondent, contended that a possessory action was incompetent, for the appellant's control and management of the mosque was solely as trustee for the purposes of the rules and regulations. Under those rules he was simply agent or custodian for the

(1) (1889) 9 Ceylon S. C. C. 4.
(2) (1902) 5 Ceylon N. L. R. 270.
(3) (1858) 3 Lorenz, 28.
(4) (1905) 2 Bal. 49.

congregation and was not in legal possession as trustee. He was in no way possessor ut dominus: see Grotius, Jus possessionis, bk. 2, c. 2, ss. 1, 2, 3, 4. The rules and regulations made the appellant subordinate to the assembly of the congregation; and although he was placed in charge of the property with power to collect the income, repair, and with the consent of the assembly to lease for two years, he was not in legal possession. The congregation was the real possessor, and this was a dispute between two of their servants as to which of them was entitled to custody of the mosque as their agent. Reference was made to Van der Linden, c. 13, s. 1; Van Leeuwen (Kotze's translation, 1881), vol. 1, p. 198, c. 8, "Of Possession and Prescription," s. 1, where the expression "using as one's own" is used; Maasdorp's Institutes of Cape Law, vol. 2, bk. 2, c. 3; Hunter's Roman Law (4th ed.), p. 341, which refers to possession "with the intention of holding as owner"; Voet, 6, 1, 29; 43, 16, 3. See also *Tissera* v. *Costa* (1) and *Alim Saibo* v. *Cadersa Lebbe* (2). It was contended that these cases were applicable and rightly decided, and that the cases cited by the appellant from 5 N. L. R. and 2 Bal. so far as they were inconsistent therewith should be overruled.

Sir R. Finlay, K.C., replied.

1911
July 27.

The judgment of their Lordships was delivered by

LORD SHAW OF DUMFERMLINE. This is an appeal by the plaintiff against a judgment of the Supreme Court of the island of Ceylon, dated November 26, 1909, reversing a judgment of the District Court of Colombo in the plaintiff's favour, dated December 9, 1908.

The action is a possessory one under Ordinance No. 22 of the year 1871. It was brought by the plaintiff, who held the position, by appointment of the congregation, of trustee of the Maradana mosque in Colombo, he having been for more than the requisite year and day in possession of the mosque, and having been forcibly ejected by the respondent and three other defendants. It is admitted that had the plaintiff been owner of the mosque the possessory action would have been suitable

(1) (1889) 8 Ceylon S. C. C. 193. (2) 9 Ceylon S. C. C. 4.

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and convenient; but it is maintained that, as he did not hold the property except as trustee or manager, the possessory remedy was incompetent. This is the only question in the case.

On June 19, 1903, the plaintiff was appointed trustee of the mosque for a period of five years. On June 21, 1908, it is alleged by the plaintiff that the defendants " unlawfully entered into and upon the said mosque and premises, and ousted the plaintiff therefrom, and took forcible possession thereof, and unlawfully and forcibly deprived the plaintiff of the management, control, and possession thereof." This is denied by the defendants.

The learned District Judge, Mr. Schneider, holds that the ouster has been amply proved, and that " as to the events of the 21st June, 1908, there is no room for any doubt that the two defendants who have given evidence and the two witnesses called for the first defendant have all been speaking what is not true."

The plaintiff denies that he had surrendered his office as trustee, and asserts that he was reappointed before the expiration of his term. The defendants, on the other hand (the defendant above named being the only one who is respondent in this appeal), alleged that on June 5, 1908, the defendant named was at a meeting of the united assembly of the congregation appointed as a trustee to succeed the appellant on the expiry of his term as such, namely, on June 19. The regularity of this meeting is denied by the appellant. Two days before the meeting, namely, on June 3, the appellant had publicly called attention, by the letter printed in the appendix, to the responsibilities attending the " grave irregularity " which, as he alleged, was " involved in summoning such a meeting without due authority," &c. Out of this conflict two facts are clear, namely, first, that each of the parties, the appellant and the compearing respondent, maintains that he is lawfully in possession as trustee or manager for the congregation; and, secondly, that instead of the question of who is in the right being settled by agreement or by law, and the appellant having been possessor of the premises in fact, the defendants ejected him

from such possession by force. The learned District Judge was of opinion that this case was one for which the possessory remedy of interdict was suitable and competent. In their Lordships' opinion this conclusion was right.

In the judgments of the learned judges of the Supreme Court there is considerable citation of authority from the ordinary text-books of the Roman-Dutch law, and also from various decisions pronounced in the Courts of Ceylon. Most of the authorities—not only the text-books, but also the decisions—appear to have been cited in the case of *Changarapilla* v. *Chelliah* (1), decided on February 13, 1902, in the Supreme Court of Ceylon. In their Lordships' view, that decision was sound in principle and is applicable to the circumstances of the present case. It was "an action brought by a person who is described as the manager of the Hindu temple, complaining that he has been forcibly dispossessed of the property and asking to be restored to possession, in a possessory suit . . . . It was urged that whatever his duties and rights were, and whatever his powers were, he did not claim to be the owner of the property ut dominus, and that, therefore, he could not maintain this action." Having thus described the suit, Bonser C.J. adds: "It seems to me that if the plaintiff, who is called the manager of the temple, has the control of the fabric of the temple and of the property belonging to it, he has such possession as would entitle him to maintain an action, even though he makes no pretence of claiming the beneficial interest of the temple or its property, but is only a trustee for the congregation who worship there." Having considered the rules and regulations for the management of the mosque, containing a statement of the rights and duties of the trustee, their Lordships think that the present case is entirely within the principle of that decision.

This case was followed by the Ceylon Courts in *Sivapragasam* v. *Ayar* (2), and *Changarapilla's Case* (1) was in express terms founded upon and followed. Now, these cases were decided, one in 1902 and the other in 1906. And the alleged conflict of authority is a conflict between previous cases in the Ceylon Courts, a conflict which in their Lordships' opinion, arising as it

(1) 5 Ceylon N. L. R. 270. (2) 2 Bal. 49.

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did upon a point of practice, might have been well held to be conclusively settled. They entertain some surprise that these later cases of *Changarapilla* (1) and *Sivapragasam* (2) were not accepted as settling any uncertainty of authority which had previously existed and as definitely binding on this point of procedure.

It is accordingly unnecessary to deal with the institutional authorities quoted, but, in their Lordships' opinion, these are not in conflict with the Ceylon practice as now fixed, and they were rightly interpreted in *Changarapilla's Case*. (1) The passage from Voet founded upon (43, 16, 3) indicates that he was alive to the consideration that to give to the expression ut dominus as applied to possession too narrow a construction might prove inequitable and unworkable, and it shews clearly that the remedy was not denied to a colonus or a procurator if the dominus was absent. And other cases, such as property which is in the possession of a wife, and which she had received by a donation inter virum et uxorem (although such a legal title was null), are treated as suitable for protection by possessory remedies. The question of possession by agency was but slightly developed, and accordingly slightly dealt with at the time, and in the works of some of these learned authors. It may be added that an instructive passage in the notable chapter on "Possession" which occurs in the exposition of Roman law by that very learned author Mr. Hunter does not appear to have been cited in the Courts below. It seems almost precisely, however, to touch the present case (p. 363): "If A. enters on land possessed by B., and neither A. nor B. asserts that the land belongs to him by any investitive fact, there is nothing unreasonable in saying that B. should be protected in his possession against A. To use the expression of Paul, as between A. and B., B. has the better right to the possession. (D. 43, 17, 2.) In a controversy between them, it is immaterial that B. does not claim to have any right of property founded on any investitive fact; for A. is in the same position."

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and the decree of the Supreme Court

(1) 5 Ceylon N. L. R. 270. (2) 2 Bal. 49.

set aside, and that of the District Court restored, with costs to the appellant here and in the Courts below.

Solicitors for appellant: *Rowe & Wilkie.*
Solicitors for respondent: *Blyth, Dutton, Hartley & Blyth.*

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[PRIVY COUNCIL.]

SAMARADIWAKARA AND ANOTHER . . . . PLAINTIFFS;

AND

DE SARAM AND OTHERS . . . . . DEFENDANTS.

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1911
July 6, 7, 21.

CONSOLIDATED APPEAL AND CROSS-APPEAL.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Joint Will of Husband and Wife—Community of Property—Construction—Gift of Usufruct for Life to Wife and Dominium to the Son—Ceylon Ordinance 15 *of* 1876, *s.* 26.

By the joint will dated April 27, 1878, of husband and wife married in community of property it was directed that certain properties including the synagogue and cottage in suit "shall be vested in me the testatrix" subject to the condition that "our executors shall not sell or otherwise alienate" the same; "nor shall I the testatrix have the power to sell or otherwise alienate the same or any of them, but I shall have a life interest therein." Under a clause headed "Inheritance upon the death of both of us" the synagogue and cottage were directed to vest in their son. The will also directed that the synagogue "should not be sold or in anywise alienated or incumbered," but should devolve on the lawful heirs of the above-named devisee, and in the absence of any such lawful heirs on the heirs instituted by the will including the said son or his or her lawful heirs. The testator died in 1878 the testatrix in 1907, after adiating the inheritance and accepting benefit under the will; the son in 1882 intestate:—

Held, that according to the true construction of the joint will a bare usufruct and not the dominium was conferred on the testatrix in respect of both properties, and that subject thereto the son took a vested interest in the same, transmissible to his heirs.

Held, also, that under Ceylon Ordinance 15 of 1876, s. 26, the first

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* *Present:* LORD SHAW OF DUNFERMLINE, LORD MERSEY, LORD DE VILLIERS, and LORD ROBSON.

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appellant as the deceased son's surviving spouse notwithstanding her remarriage to the second appellant took by inheritance one half of his property.

CROSS-APPEALS from a judgment of the Supreme Court (July 18, 1910) which varied a judgment of the District Court of Colombo (November 16, 1908).

The first plaintiff, wife of the second plaintiff, was formerly married to the late Edwin Robert Alwis, brother of the first, third, and fifth defendants, all of them children of the late James Alwis and Florence his wife. The second, fourth, and sixth defendants were sued as husbands of the first, third, and fifth defendants respectively; the seventh defendant as administrator with the joint will annexed of the estate of the said James and Florence Alwis.

James Alwis died on July 5, 1878. The joint will dated April 27, 1878, was proved in the District Court of Colombo, and probate thereof was granted to two of the executors named in the will, both of them since deceased. The widow, Florence Alwis, adiated the inheritance and took benefit under the will.

Clause 3 of the will, headed "In the event of the testator dying first," makes certain gifts to take effect in that event and inter alia directs that certain land shall be conveyed to a devisee under the condition "that he shall not mortgage or alienate the same, but shall only have a life interest therein." Clause 6 is headed "Ad interim provision for children." Clause 7, entitled "Provision for the testatrix if she survive the testator," disposes of numerous parcels of land and contains the following provisions: "It is our will and desire that all the above movable property as above settled and all the immovable property until they shall be transferred as above directed and the other following lands and houses shall be vested in me the testatrix subject to the undermentioned conditions."

Then follows a list of forty lands and houses, and amongst them the properties in suit, (3.) the synagogue in Colpetty, Colombo; (4.) Barandeniya Cottage in Colpetty, Colombo.

The will then continues: "We desire that our executors shall sell . . . . the above lands and premises from number

seventeen . . . . to number forty . . . . both inclusive . . . . Our executors shall not sell or otherwise alienate the first sixteen lands and premises hereinbefore mentioned, nor shall I the testatrix have the power to sell or otherwise alienate the same or any of them, but I shall have a life interest therein."

Clause 8, entitled "Inheritance upon the death of both of us," vests various lands in testator's children (including James Henry, a son by a previous marriage), and amongst them in Edwin Robert in the following words: "The synagogue and Barandeniya Cottage in Colpetty to vest in Edwin Robert."

Clause 9, entitled "Restrictions on the above inheritance," contains the following: "We direct that the following premises namely [certain other lands disposed of in the preceding clause] and the synagogue in Colpetty, or any portion of any of them shall not be sold, or in any way alienated or encumbered, but shall devolve respectively on the lawful heirs of the above-named devisees; in the absence of any such lawful heirs on the persons whom we institute heirs or his or her lawful heirs."

In clause 10, headed "Institution of heirs," the testators institute and appoint James Henry, Helen Florence, Edwin Robert, Ezline Maria, and Annie Lucy "to be the heirs of and to all the rest and residue of all our property share and share alike."

In June, 1882, Edwin Robert died intestate, leaving him surviving his widow (the first plaintiff), his mother, and his three sisters, first, third, and fifth defendants.

In April, 1907, Florence Alwis died. By her separate will, dated January 26, 1901, she confirmed the joint will of April 27, 1878, and disposed of the rest of her movable and immovable property not included therein.

On May 8, 1908, plaintiffs filed their plaint, whereby the first plaintiff, claiming to be one of the lawful heirs of Edwin Robert Alwis, prayed for a declaration of title to an undivided half share of the synagogue and of Barandeniya Cottage, and for possession, damages, and costs. On July 14, 1908, the defendants filed their answer, denying that the first plaintiff was one of the lawful heirs of Edwin Robert Alwis, or that she ever became entitled to an undivided half of the premises in claim.

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On November 16 the District Judge dismissed the action with costs.

He decided (1.) that the words "shall be vested in the testatrix" in clause 7 of the joint will mean "vested in me as owner" and that Florence Alwis therefore took the dominium and not merely a usufruct; (2.) that the prohibition of alienation contained in the same clause affected the ownership of Florence Alwis with a fidei commissum; (3.) that by clause 8, headed "Inheritance upon the death of both of us," the dominium in the synagogue and in Barandeniya Cottage upon the death of the survivor of the parties to the joint will was to vest under the fidei commissum in Edwin Robert Alwis; (4.) that by clause 9, headed "Restrictions on the above inheritance," the interest thus conferred on Edwin Robert was as regards the synagogue, only, affected with a further fidei commissum in favour of his lawful heirs; (5.) that Edwin Robert having predeceased his mother never became entitled to either property, and that no interest therein could pass on his death to his heirs qua heirs; (6.) that in any event the first plaintiff was not one of "his lawful heirs" within the meaning of the will; (7.) that upon the true construction of the will the testatrix became absolutely entitled to both the lands in claim upon the death in her lifetime of her son Edwin Robert, and that no interest in the said lands at any time became vested in the first plaintiff.

The Supreme Court affirmed this decision as regards the cottage, and reversed it as regards the synagogue.

Hutchinson C.J. referred to the inconsistency of some of the expressions used in the joint will, and observed that, reading the whole will as it might be read by a layman without any special knowledge of Roman-Dutch law, he would say that the intention was that the surviving testatrix should have only a life interest in both properties. But having regard to the fact that the testator was a Ceylon advocate, well acquainted with Roman-Dutch law, he held that the dominium of both properties was vested in Florence Alwis, with a fidei commissum in favour of Edwin Robert, thus affirming the decision of the District Court on that point. As regards the synagogue, he held that clause 9 created a fidei commissum after the death of Edwin

Robert in favour of his "lawful heirs," of whom the first plaintiff was one, and that she was entitled to one half of that property.

Middleton J. was of opinion that clauses 7, 8, and 9 of the joint will created a fidei commissum, making the widow the first institute, and substituting the specified children and their heirs directly as fidei commissarii; that such of the first sixteen properties in the list in clause 7 as are not mentioned in clause 9 were to devolve on the specified children absolutely without restraint as to alienation, while those mentioned in clause 9 were to devolve on the lawful heirs of the devisees as fidei commissarii, and, if no such heirs were existing, then on the survivors of the heirs instituted by clause 10 or their lawful heirs.

This decision was affirmed on review, Wood-Renton J. (see (1910) 13 Ceylon New L. R. 353—360) relying specially on Voet, 7. 1. 10, where it is said that if the usufruct of a thing has been given with a prohibition against alienation full ownership has been bequeathed, for the prohibition is only applicable to an owner, a usufructuary being incapacitated by the ordinary law.

P. O. Lawrence, K.C., Horace E. Miller, and *Fenton,* for the plaintiffs (appellants in the first and respondents in the cross appeal), contended that according to the true construction of the joint will Edwin Alwis obtained on the death of his father the dominium of the two properties in claim, subject to a usufruct in favour of his mother for her life.

[LORD DE VILLIERS referred to *Strydom* v. *Strydom's Trustees.* (1)]

On his death intestate and without issue his widow the first plaintiff became entitled by inheritance to one half of those properties under Ceylon Ordinance 15 of 1876, s. 26. Reading the whole will together it was submitted that notwithstanding the inconsistency of some of the expressions the intention was sufficiently expressed to give to the surviving testatrix a life interest only. It was also clear that the intention of the will was

(1) (1894) 11 Cape S. C. R. 425.

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that the properties devised to Edwin vested in interest on the death of the testator, although they did not vest in possession until after the widow's death. Vesting in the testatrix as directed by clause 7 means "subject to the undermentioned conditions," which included the condition that she should have a life interest. Vesting is not a term of Roman-Dutch law and does not necessarily confer dominium. So too the prohibition against alienation is consistent with the limitation that the widow and testatrix shall only have a life interest. Reference was made to *Strydom* v. *Strydom's Trustees* (1), cited in Morice's English and Roman-Dutch Law, p. 319; Pereira's Law of Ceylon, vol. 2, p. 349; *Nortje* v. *Nortje*. (2)

Dornhorst, K.C., De Gruyther, K.C., and *R. W. Lee*, for the respondents and cross-appellants, contended that the property in suit on the death of the testator vested according to the true construction of the joint will in the testatrix in full ownership. On the effect of a mutual will by husband and wife who had been married in community of property see *Denyssen* v. *Mostert* (3), followed in *Natal Bank, Ld.* v. *Rood* (4), and Morice's English and Roman-Dutch Law, p. 271. In clause 3 of the will the devisee clearly takes the dominium, and the added words "shall only have a life interest therein" impose a fidei commissum. The same effect must be given to the words "I shall have a life interest therein" in clause 7, which therefore on its true construction gives to the testatrix on the death of her husband the dominium of the lands in suit subject to a condition prohibiting alienation and limiting the enjoyment to her lifetime. The beneficiaries are designated in another part of the will, and the testatrix took subject to a fidei commissum in favour of Edwin, which failed on his predeceasing her and could not be transmitted to his heirs. Clause 9, which must be read with clause 8, merely imposes restrictions on any inheritance which comes into effect under clause 8. Edwin having predeceased his mother took no inheritance under the earlier clause, and accordingly clause 9 failed to take effect. It was contended that the frequent use of the word "vesting" and the prohibition against

(1) 11 Cape S. C. R. 425.
(2) (1888) 6 Cape S. C. R. 9.
(3) (1872) L. R. 4 P. C. 236.
(4) [1910] A. C. 581.

alienation shewed that the intention was to confer the dominium on the testatrix : see Voet, 7. 1. 10 ; 36. 1. 69 ; Juta's L. C. on Wills, pp. 161, 165 ; Grotius, 2. 20. 14 ; Ulrik Huber, Hedensdaegse Rechtsgeleer-theyt, 2, 19, 111, 122 ; Jà Sande Decisiones Frisicæ, 4, 5, 1. The power of sale conferred on the executors did not prevent the testatrix acquiring dominium until such power should be exercised, and the expression " life interest " is frequently used in the Colony as including dominium : see *Joachinoe* v. *Robertu* (1) ; *Omar Lebbe Marcar* v. *Ebert* (2) ; *Senanayeke* v. *Dissanayeke* (3) ; *Deviot* v. *Fryner* (4) ; *Kiembeyage Tina* v. *Kada Uda Sadris.* (5) As regards the first appellant's claim under Ordinance 15 of 1876 it was contended that on its true construction it did not make the widow heir to her husband. By the common law of Ceylon she had not the right of succession as claimed, and the Ordinance merely confers upon her a statutory benefit in the event of his death intestate to compensate her for the loss of the benefit which previous to the Ordinance she would have derived from marriage in community of property.

Lawrence, K.C., in reply.

1911
July 21.

The judgment of their Lordships was delivered by

LORD DE VILLIERS. The main question to be decided in this appeal is whether on his death, which took place in 1882, Edwin Alwis had acquired such an interest in certain bequests made to him by the joint will of his parents as was capable of being and was transmitted to his heirs. The will was made on April 27, 1878, by James and Florence Alwis, who were married in community of property. It contained several clauses under distinct headings. By the 6th clause, under the heading " Ad interim provision for the children," bequests of movable and immovable property were made to several of the testators' children upon their respectively marrying or attaining the age of twenty-five years. By the 7th clause, under the heading " Provision for the testatrix if she survive the testator," the testators declare, " It is our will and desire that all the above movable property as above settled, and all

(1) (1890) 9 Ceylon S. C. C. 101.
(2) (1893) 3 Ceylon L. R. 5.
(3) (1908) 12 Ceylon N. L. R. 1.
(4) (1879) 2 Ceylon S. C. C. 194.
(5) (1885) 7 Ceylon S. C. C. 135.

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the immovable property until they shall be transferred as above directed, and the other following lands and houses, shall be vested in me the testatrix subject to the undermentioned conditions." Then follows a list of such lands and houses, the third on the list being the synagogue in Colpetty, and the fourth being Barandeniya Cottage in Colpetty. The testators then direct as follows: "Our executors shall not sell or otherwise alienate the first sixteen lands and premises hereinbefore mentioned [including the synagogue and cottage] nor shall I the testatrix have the power to sell or otherwise alienate the same or any of them, but I shall have a life interest therein." Under the 8th heading, "Inheritance upon the death of both of us," the testators gave the following among other directions: "The synagogue and Barandeniya Cottage in Colpetty to vest in Edwin." By the 9th clause, under the heading "Restrictions on the above inheritance," the testators direct that certain of the premises including the synagogue "shall not be sold, or in anywise alienated or encumbered, but shall devolve respectively on the lawful heirs of the above-named devisees: in the absence of any such lawful heirs on the persons whom we institute heirs or his or her lawful heirs." The 10th clause contains an institution of heirs of whom Edwin is one. The testator died in 1878, and the testatrix in 1907. After the death of the testatrix the first plaintiff, as the surviving spouse of Edwin, instituted an action in the District Court of Colombo, assisted by her second husband, the second plaintiff, to have it declared that as heir ab intestato of her deceased husband she was entitled to undivided half shares in the synagogue and the cottage. The District Court held that Edwin, on his death, transmitted no rights under either bequest to his heirs, and accordingly dismissed the plaintiffs' action. On appeal the Supreme Court of Ceylon upheld the judgment of the District Court as to the cottage, but declared that the first plaintiff was entitled to a half share of the synagogue, with damages at a rate agreed upon by the parties. The present appeal is brought by the plaintiffs as to the cottage, and there is a cross-appeal by the defendants, who represent the estate of the testatrix, as to the synagogue.

No question arises in this case as to whether or not the

provisions of the joint will were binding on the testatrix after her husband's death. They had been married in community of property, and it would have been quite competent for her, on her husband's death, to repudiate the will so far as it affected her half share of the joint estate. It is common cause, however, that she elected to take benefits under the will and to abide by its provisions. After adiation on her part she could not deprive any of the beneficiaries of rights accruing to them under the will even in her lifetime. By the 6th clause, for instance, of the will some of the children were to receive money and estates on their respectively attaining their twenty-fifth year. The testatrix could clearly not have prevented these bequests from taking full effect upon any of the children attaining that age during her lifetime. The ground upon which the Supreme Court decided against the plaintiffs on their claim for the cottage was not that the testatrix was unable by will to confer rights to take effect during her lifetime, but that, according to the legal construction of the will, no such rights had been conferred on Edwin. The learned Chief Justice, in his carefully considered reasons, says: "The will can hardly be said to use any technical terms of Roman-Dutch law, it institutes and appoints heirs to the residuary estate but it also appoints executors; it says on the one hand that the widow shall not alienate the property, words which are meaningless if she has only a life interest, and on the other hand it says that she is only to have a life interest, and those words are unnecessary if the intention that she should have the dominium subject to a fidei commissum is sufficiently expressed. Reading the whole will as it might be read by a layman without any knowledge of the technicalities of Roman-Dutch law, I should have said that the intention was that the surviving widow should have only a life interest in those properties." Thus far their Lordships entirely agree with the Chief Justice, but he then proceeds thus: "I cannot get over the facts that the Roman-Dutch law as to fidei commissa is in force in Ceylon, and that the testator was a Ceylon lawyer, and that the terms of clauses 7 and 8 of the will appeared to vest the dominium in the surviving widow with a fidei commissum in favour of Edwin Robert, and that clause 9 in the same way creates a fidei

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commissum as to one of the houses, after the death of Edwin, in favour of his heirs." The Chief Justice does not quote the authority which forces him to this conclusion, but it is clear from the reasons of Wood-Renton J. that the Supreme Court was mainly influenced by a passage in Voet's Commentaries (7. 1. 10) to the effect that where a usufruct is bequeathed to a person with a prohibition against alienation the intention should be presumed to be to confer to him full ownership. As there can be no question of a person who is not the owner of property alienating it, the presumption, according to Voet, is that where a testator prohibits a legatee from alienating property bequeathed the intention is to make him the owner. It is not, however, more than a presumption, and there is nothing in the passage to shew that the presumption must prevail if there are other indications of a different intention on the testator's part. In the present case the testators took pains to emphasize the limited nature of the interest intended to be conferred on the surviving widow. It is true that the will does not say that she shall have "only" a life interest, but the judges in the Court below were constrained to come to the conclusion that this is what was meant. If the word "only" had been used there would have been no doubt that a bare usufruct and not dominium was intended to be conferred on the testatrix. The fact that it was not used should not, in their Lordships' opinion, be allowed to frustrate the real intention of the testators. It does not appear that the surviving widow ever claimed the dominium even after the death of Edwin. When she came to make her separate will she treated all the properties bequeathed by the joint will as no longer belonging to her, and disposed only of such assets as were not included in the bequests given by the joint will. She may, of course, have been ignorant of her rights, but if there be any doubts as to the intention of both testators her conduct after the death of her husband and of her son Edwin cannot be entirely ignored.

As a further reason for holding that ownership and not usufruct was intended to be conferred on the testatrix it has been urged before their Lordships that the use of the word "vested" in the 7th clause, and the word "vest" in the

8th clause, is inconsistent with any intention to confer a vested interest on Edwin before his mother's death. If the words were used in their strictly technical sense there would be much force in this contention, but they seem to have been used in a somewhat loose sense, as indicating the time when the enjoyment of the properties, whether temporary or permanent, was to have its commencement. The learned Chief Justice laid stress on the fact that the testator was a Ceylon lawyer, but under the Roman-Dutch system the word "vest" would not have the same definite and intelligible meaning as it would have either in England or in Scotland. Even under the English law the word would not necessarily import the transfer of ownership, for, as was said by Willes J. in *Hinde* v. *Chorlton* (1), "there is a whole series of authorities in which words which in terms vested the freehold in persons appointed to perform some public duties, such as canal companies and boards of health, have been held satisfied by giving to such persons the control over the soil which was necessary to the carrying out the objects of the Act without giving them the freehold." In *Stracey* v. *Nelson* (2) it was provided by an Act that certain lands should be vested in the commissioners of sewers, but the Court held that only the control over the land and not the freehold passed to them. From the Scotch cases cited in M'Laren's Laws of Wills and Succession (vol. 2, p. 805) it would appear that in Scotland also the use of the word "vesting" is not conclusive that it was used in its strictly legal sense. Among the cases cited is *Croom's Trustees* v. *Adams* (3), where it was said that the appointment of an express clause of vesting is "a very doubtful remedy" for the inconvenience that sometimes arises from the difficulty of determining vesting upon legal principles. The phrase used in Roman-Dutch law to indicate that a thing has begun to be owing, the right to which is therefore transmissible, is "dies cessit" as distinguished from "dies venit," when the time for enjoyment has arrived, and the thing can be claimed (see Voet, 36. 2. 1). Where the condition of a bequest is that the legatee shall survive a person having a life interest in the thing bequeathed, no transmissible

(1) (1866) L. R. 2 C. P. 104. (2) (1844) 12 M. & W. 535.
(3) (1859) 22 D. 45.

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interest accrues to such legatee unless the condition of survivorship is fulfilled. Their Lordships are unable to concur in the view that the use by the testators of the word "vesting" indicates an intention to impose such a condition on the bequest made by them to their son Edwin. It so happens that he left no children to whom any part of his interest could be transmitted, but the testators had no reason, during their joint lifetime, to suppose that he would die childless. If he had died after his wife, leaving children by her, it would have been difficult to infer from the use of the word "vest" that the children were intended to be excluded in the event of his dying before his mother. The circumstance, however, that his wife survived him and thus became one of his heirs should not be allowed to affect the construction of the will.

As to the heading of the 8th clause of the will, "Inheritance upon the death of both of us," upon which great stress was laid in the arguments before their Lordships, it does not carry the matter much further. It indicates that the devolution of the inheritance after the death of both the testators is dealt with in that clause, but it cannot be construed as meaning that no transmissible interest should be acquired by the heirs mentioned in the clause until after the death of both the testators.

Nor is the case for the defendants assisted by the 9th clause of the will, which directs that the synagogue "shall not be sold or in anywise alienated or encumbered, but shall devolve respectively on the lawful heirs of the above-named devisees." The only difference between the bequest of the synagogue and the bequest of the cottage is that in the case of the former Edwin would be restrained, after coming into possession, from alienating the synagogue, whereas in the case of the cottage no such restriction is placed upon his rights of ownership. It was rightly held by the Supreme Court that the effect of such restraint would be to impose a fidei commissum on him in regard to the synagogue in favour of his heirs ab intestato, but it does not follow that such heirs acquired no rights in respect of the cottage. He is referred to as one of the devisees, and if he was a devisee of the synagogue he was also a devisee of the

cottage, the right to which he could transmit to his heirs. The Supreme Court, reversing the judgment of the District Court in this respect, held that the heirs of Edwin are entitled under the 9th clause of the will to claim the synagogue, but the judgment of the District Court as to the cottage was upheld. In the opinion of their Lordships, however, the rights of Edwin's heirs to the cottage are not affected by the difference between the directions as to the synagogue and the directions as to the cottage. If Edwin had come into possession of the synagogue he would not have been entitled to alienate it, but in regard to neither property was there any intention to do more than postpone the operation of the bequest.

In this view of the case it is unnecessary to express any opinion as to what the decision would have been if it had been found that the effect of the will was to create a fidei commissum and not to confer a bare usufruct on the surviving testatrix. Their Lordships would, however, make this observation, that, although there is a presumption, in the case of a fidei commissum, that a testator intended the fidei commissary legatee to have no transmissible rights unless he survives the fiduciary legatee, such presumption would have to yield to other clear indications in the will of an intention to the contrary.

The question still remains whether the first plaintiff, as the surviving spouse of Edwin, is entitled to any share in the properties bequeathed to him. Under the Roman-Dutch law she would not have been one of his heirs ab intestato, but the 26th section of the Ceylon Ordinance 15 of 1876 enacts that "when any person shall die intestate as to any of his or her property, leaving a spouse surviving, the surviving spouse shall inherit one half of the property of such person." It is clear from the 25th and subsequent sections that the object of that portion of the Ordinance was to regulate the course of intestate succession, and to fix the shares to which the heirs ab intestato should be respectively entitled. It was said by the judge of the District Court that a person cannot be the widow of two persons at one and the same time, but the first plaintiff claims to be an heir of her first husband, not as being his widow, but as being his surviving spouse, and she remains such surviving spouse whether

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she has remarried or not. Her rights as one of his heirs accrued at the time of his death, and, as the Ordinance does not make it a condition that the surviving spouse should not remarry, she is not prevented when the time for the postponed enjoyment has arrived—dies venit—from asserting her right as one of his heirs ab intestato. Their Lordships will therefore humbly advise His Majesty that the appeal against the judgment, so far as it affects the cottage in Colpetty, Colombo, should be allowed, that the defendants' cross-appeal should be dismissed, and that the first plaintiff should be declared entitled to an undivided half share of the cottage as well as of the synagogue, and to damages at the rate agreed upon by the parties. The costs of the appeal, and the costs in the Courts below, will be borne by the defendants.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*
Solicitors for respondents: *Stephenson, Harwood & Co.*

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By the original articles of a limited company it had the power in general meeting both to create and issue new shares on such terms as it thought fit. Upon the true construction of certain articles the power of creating, not the power of issuing, was transferred to the directors:—
Held, that although the language of article 9 was general the generality of it was restrained by the obvious effect and the obvious intention of the 53rd and 59th articles, and that the directors had not power to issue new shares without the authority of a resolution in general meeting.
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There being no rules of the House of Lords in respect of criminal appeals, the House on presentation of such an appeal will order the same to be read and prosecuted subject to such standing orders as may be applicable thereto and to the requirement that the respondent to such an appeal "shall lodge a case forthwith in answer thereto"; and the House will accept typewritten copies of the papers necessary to the disposal of the appeal, the petition of appeal alone being printed.

The defendants, who were brother and sister, were indicted under the Punishment of Incest Act, 1908, for having had carnal knowledge of each other during stated periods in 1910. Evidence was given on behalf of the prosecution to the effect that, at the times specified in the indictment, the defendants were seen together at night in the same house, which contained only one furnished bedroom; and that there was in the bedroom a double bed which bore signs of two persons having occupied it. The witnesses for the prosecution were not cross-examined. The prosecution then tendered evidence of previous acts of the defendants with the view of shewing what were the relations between them. This evidence was objected to, but was admitted. The evidence was to the effect that the male defendant in November, 1907, took a house to which he brought the female defendant as his wife; that they lived there as husband and wife for about sixteen months; that at the end of March, 1908, the female defendant gave birth to a child, and that she registered the birth, describing herself as the mother and the male defendant as the father. The defendants having been convicted, they appealed, and the Court of Criminal Appeal quashed the conviction and directed a "judgment and verdict of acquittal to be entered," on the ground that the evidence objected to was not in the first instance admissible, and that nothing had occurred in the conduct of the defence to render it admissible as evidence in rebuttal:—

Held by the House of Lords, reversing the order of the Court of Criminal Appeal, that the evidence objected to was admissible on the issue; for the object of that evidence was to establish that the defendants had a guilty passion towards each other and to rebut the defence of innocent association as brother and sister.

Held by the Court of Criminal Appeal, that the Court has no power to hold a defendant, whose conviction has been quashed, to bail or to keep him in custody pending an application by the Director of Public Prosecutions or the prosecutor to the Attorney-General, under s. 1, sub-s. 6, of the Criminal Appeal Act, 1907, for his certificate that the decision of the Court involves a point of law of exceptional public importance and that it is desirable that a further appeal should be brought to the House of Lords, or pending an appeal if the certificate is granted.

Held, also, by the Court of Criminal Appeal, that the Court had power to give effect to the decision of the House of Lords by making an order dismissing the original appeal against the conviction and restoring the conviction, and to issue a warrant for the arrest of the defendant who had been discharged from custody. THE KING *v.* WILLIAM HENRY BALL. THE KING *v.* EDITH LILIAN BALL - **H. L. (Criminal Appeal)** **47**

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DEPENDANTS—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

DIRECTORS—Company.
See under COMPANY.

DISPUTES—Disputes between employer and workmen.
See under EMPLOYER AND WORKMAN.

DIVIDENDS—Company.
See under COMPANY.

EDUCATION.
See under SCHOOLS.

EJECTMENT—Action of—Validity of Dominion lease to plaintiffs—Deceit on the Crown—Plaintiffs without notice of previous inconsistent grant (if any) - - **711**
See PRIVY COUNCIL APPEALS. 10.

ELECTION—Succession—Approbate and reprobate—Invalid exercise of power of appointment - - - - - 217
See SCOTTISH LAW.

EMPLOYER AND WORKMAN—*Compensation—Common Employment—Injury to Workman from Negligence of Fellow Workman—Compensation—Indemnity—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

The doctrine of common employment does not apply as between fellow workmen. Where injury has been caused to a workman by the negligence of fellow workmen in committing a breach of statutory regulations imposed for the protection of the workmen, there, if the injured workman has recovered compensation against his employer under the Workmen's Compensation Act, 1906, the employer is entitled to be indemnified by the fellow workmen whose breach of the statutory regulations caused the injury. LEES *v.* DUNKERLEY BROTHERS
H. L. (E.) 5

2. —— *Compensation—Dependant—Partial Dependency—Basis of Assessment—Claim by Parent—Earnings—Cost of Maintenance—Pecuniary Value of Services rendered by Deceased to Claimant—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I., par.* 1 (*a*) (ii.).

The question how far a member of the family of a deceased workman was dependent on his earnings within the meaning of the Workmen's Compensation Act, 1906, is a question of fact to be determined by the county court judge upon a consideration of all the circumstances of the case.

Main Colliery Co. v. *Davies* [1900] A. C. 358, explained.

Upon an application by a father, who claimed compensation under the Act on the footing of partial dependency in respect of the death of a son from an accident at the respondents' colliery, it appeared that the son, who lived at his father's house, assisted the father in his trade as a barber. The county court judge having found that the son's earnings at the colliery were not more than sufficient for the cost of his maintenance, and that consequently the father was not a dependant, the Court of Appeal set aside the award and remitted the matter to the county court judge to award compensation on the basis that he was not entitled to deduct from the son's earnings the cost of his maintenance :—

Held, that the county court judge was not precluded by law (1.) from deducting from the son's earnings the cost of his maintenance; (2) from taking into account as against the cost of maintenance the pecuniary value of the services rendered by the son to the father in the latter's trade as a barber; and the cause was remitted to the county court judge with these instructions.

Osmond v. *Campbell & Harrison, Ld.* [1905] 2 K. B. 852, if and so far as it holds that upon a question of partial dependency the county court judge is not entitled to deduct from the earnings of the deceased the cost of his maintenance, overruled.

EMPLOYER AND WORKMAN—*continued.*

Order of the Court of Appeal [1911] 1 K. B. 341, varied. TAMWORTH COLLIERY COMPANY *v.* HALL - - - - - - **H. L. (E.) 665**

3. —— *Compensation—Dependency—Total or Partial—Death of Workman—Widow—Legal Liability to support—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13, "*Dependants*," *Sched. I., par.* 1 (*a*) (i.), (ii.).

Whether a particular person was dependent upon the earnings of a deceased workman so as to have a title to compensation under the Workmen's Compensation Act, 1906, is a question of fact.

At the death of a workman caused by accident his wife had not for more than twenty years lived with or been supported by her husband, and had in no sense relied upon him for help :—

Held, that the wife was not entitled to compensation as a dependant upon her husband.

Decision of the Court of Appeal [1911] 1 K. B. 250, reversed. NEW MONCKTON COLLIERIES, LD. *v.* KEELING - - **H. L. (E.) 648**

4. —— *Compensation—Fatal Accident—Evidence—Inference—Accident arising out of and in the Course of the Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A train consisting of an engine and three trucks, which were being pushed by the engine, was in charge of a brakesman, who was riding in the foremost truck. This train overtook another train travelling in the same direction, which consisted of an engine and brakes van, the engine being in front. The two trains proceeded buffer to buffer, but were not coupled. After they had passed one set of points, which had been operated by the brakesman in the brakes van, and while they were on the way to another set of points a quarter of a mile off, the brakesman in the truck attempted to climb out of the truck into the brakes van ahead, and while doing so fell and was killed. The trains would have had to pass over the second set of points and then stop, and one of the brakesmen would have had to alight and raise a lever to allow the trains to pass back over the points in the reverse direction on to a branch line. The brakes van was furnished with a step, whereas the truck had none. The railway and trains were the property of a colliery company whose servants the men were. The widow of the deceased man claimed compensation under the Workmen's Compensation Act, 1906 :—

Held (Lord Atkinson dissenting), that there was evidence from which the arbitrator could infer that the deceased was trying to climb into the brakes van with a view to alighting therefrom by the step for the purpose of attending to the points as the train was passing, and that the accident arose out of as well as in the course of the employment.

Decision of the Court of Appeal [1911] 1 K. B. 1036, affirmed. RICHARD EVANS & CO. *v.* ASTLEY - - - - - - **H. L. (E.) 674**

5. —— *Compensation—Shipping—Seaman—Mode of Assessment—Liabilities of Employer under Merchant Shipping Acts—Workmen's*

EMPLOYER AND WORKMAN—*continued.*

Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1 (*e*) ; *First Schedule*, *par.* 3.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1906, the Act is applied to seamen subject to certain modifications including (*e*), which provides that the weekly payment shall not be payable in respect of the period during which the shipowner is under the Merchant Shipping Acts liable to defray the expenses of maintenance of the injured seaman.

In fixing the amount of the weekly payment paragraph 3 of the First Schedule enacts that "regard shall be had to any payment, allowance or benefit which the workman may receive from the employer during the period of his incapacity . . . ."

The words "any payment, allowance or benefit" must be construed with some limitation. For instance, regard must not be had to payment or discharge of debts due from the employer to the workman, nor (in the case of a seaman) to any payment, allowance, or benefit which under the Merchant Shipping Acts the employer is bound to give, or which is not received in respect of the seaman's incapacity and in respect of that period of incapacity which is covered by the Compensation Act. The meaning is that the seaman is not to be paid twice over by the overlapping of benefits derived from two separate statutes.

A seaman on a voyage abroad was rendered totally incapable by an accidental injury and was placed in a foreign hospital. The shipowners, in accordance with their obligations under the Merchant Shipping Acts, paid him eight days' wages for the interim between the accident and his discharge, also his medical and surgical expenses in the hospital, and made provision for his maintenance and return to England :—

Held, that in fixing the amount of the weekly payment under the Workmen's Compensation Act, 1906, in respect of his continued incapacity in England regard must not be had to the payment of the eight days' wages or of the maintenance and other expenses.

Decision of the Court of Appeal [1909] 2 K. B. 704, reversed, and decision of the learned county court judge restored. McDERMOTT *v.* OWNERS OF S.S. "TINTORETTO" - **H. L. (E.) 35**

6. —— *Dispute between Employer and Workman—Subsisting Claims—Jurisdiction of Court of Summary Jurisdiction to adjust and set off—Set-off of Employer's Claim for Damages against Workman's Wages — Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 3, *sub-s.* 1 ; *s.* 4.

A workman owed his employer money for damages for breach of contract. The employer owed the workman wages. Upon a summons by the employer against the workman claiming the damages and that the damages and the wages should be adjusted and set off, the workman contended that the Court had no jurisdiction to set off the damages against a claim for wages which he had not made :—

Held, that the Court had the jurisdiction to adjust and set off the two sums against one another by virtue of the Employers and Workmen Act, 1875, s. 3, sub-s. 1.

Decision of the Court of Appeal [1910] 2 K. B. 445, affirmed. KEATES *v.* LEWIS MERTHYR CONSOLIDATED COLLIERIES, LIMITED **H. L. (E.) 641**

7. —— *Compensation—Shipping—Seaman—Member of Royal Naval Reserve—Concurrent Contracts of Service—Amount of Compensation —Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 9, *sub-s.* 1 ; *Sched. I., par.* 2 (*b*).

A stoker on board a merchant ship, who was entitled to wages from the shipowners, and also as a stoker in the Royal Naval Reserve to 6*l.* a year as a retainer, was injured by an accident on the ship which disabled him from continuing to serve in the Royal Naval Reserve :—

Held, that the stoker was entitled under the Workmen's Compensation Act, 1906, to compensation from the shipowners not only in respect of his wages but also of the retainer, which must be taken into account as earnings under a concurrent contract of service.

Decision of the Court of Appeal [1911] 1 K. B. 376, affirmed. OWNERS OF S.S. "RAPHAEL" *v.* BRANDY - - **H. L. (E.) 413**

8. —— *Compensation—Shipping—Seaman—Return to Ship—Accident arising out of and in Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A sailor, having been on shore with leave, while returning to the quay fell into the water and was drowned. The access to the ship from the quay was by a gangway which was properly lighted. There was no evidence whether he had or had not reached the gangway when he fell :—

Held, that the accident arose in the course of the deceased's employment, but not out of the employment.

Decision of the Court of Appeal [1911] 1 K. B. 523, affirmed. KITCHENHAM *v.* OWNERS OF S.S. "JOHANNESBURG" - **H. L. (E.) 417**

9. —— *Compensation—Shipping—Seaman—Return to Ship—Accident arising out of and in Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

The master of a ship, which was lying in Bangor Roads owing to stress of weather during a trading voyage from Liverpool to Penmaenmawr and back, went on shore in the evening and, after staying at a hotel for an hour, returned to the pier and hailed his ship to send a boat. Before the boat reached him he fell off the pier and was drowned. It was not proved that he went ashore on the ship's business, but it was proved that he had a right to be on shore. His dependants claimed compensation under the Workmen's Compensation Act, 1906 :—

Held, that the accident did not arise out of the deceased's employment.

Decision of the Court of Appeal [1910] 1 K. B. 772, affirmed. FLETCHER *v.* OWNERS OF SHIP "DUCHESS" - - - **H. L. (E.) 671**

10. —— *Compensation—Taxi-cab Driver —"Workman"—"Contract of Service"—Work-*

EMPLOYER AND WORKMAN—*continued.*

men's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

The findings of fact by a county court judge sitting as an arbitrator under the Workmen's Compensation Act, 1906, cannot be set aside if there was evidence to support the findings. The question whether there was evidence is a question of law.

The respondents let out a taxi-cab to the appellant, who was injured by an accident while he was driving the cab. Upon an application for compensation under the Act there was evidence that the relation of the respondents to the appellant was that of bailor and bailee of the taxi-cab, and the county court judge found as a fact that that was the true relation and that there was no contract of service :—

Held, that the finding could not be set aside, and that the appellant was not entitled to compensation. SMITH *v.* GENERAL MOTOR CAB COMPANY, LIMITED - - - **H. L. (E.) 188**

11. —— *Slander—Liability of Master for Slander uttered by Servant — Relevancy of Averments.*

In an action of damages for slander against a municipal corporation, the pursuer averred that one Gilmour, who was in the service of the defenders as a tax collector, and whose duties included the collection of the police assessments payable by the pursuer's husband and the granting of receipts therefor and for instalments thereof, while in the exercise of his duty as police tax collector in the employment of the defenders called at the pursuer's house and demanded payment of the police taxes. The pursuer tendered the balance due, which Gilmour declined to accept as correct and asked to see the receipts for previous payments, and then left the house. That when he did call again on the same day he accused the pursuer of having altered a receipt for 7*s.* 6*d.* from the sum of 4*s.* 6*d.*, for which it had been truly made out, for the purpose of defrauding the defenders of the sum of 3*s.*; that the receipt bore no marks of having been altered; that when she denied the charge Gilmour became violent and threatened to lodge information with the police authorities which would result in her being put in gaol for three months for forgery; and that he repeated the slander in the house of a neighbour :—

Held, reversing the decision of the Second Division of the Court of Session, 1910 S. C. 693, that the averments disclosed no ground of action against the defenders, for there was nothing on the face of them to shew expressly or by implication that the expression of any opinion by Gilmour as to the genuineness of any receipt which might be produced to him for payment of taxes was within the scope of his employment. GLASGOW CORPORATION *v.* LORIMER **H. L. (Sc.) 209**

EVIDENCE—Fishery—Navigable non-tidal lake —Public user — Prescription — Crown grants - - - - - - - **552**
See FISHERY. 1.

—— Incest—Evidence to prove previous relations—Admissibility - - - **47**
See CRIMINAL LAW.

EVIDENCE—*continued.*

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

EXTRADITION—Proof of requisition not a condition of arrest or committal—Appeal from Manitoba - - - - **735**
See PRIVY COUNCIL APPEALS. 13.

FATAL ACCIDENT—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

FIDEI COMMISSUM— Mutual will—Construction of codicil—Gift to the two sons, with a fidei commissum in favour of their eldest sons - - - - - **450**
See PRIVY COUNCIL APPEALS. 22.

FIRECLAY—Mines - - - - - **290**
See MINES.

FISHERY—*Navigable Non-tidal Lake—Public User—Prescription—Evidence—Crown Grants.*

In an action by the respondents against the appellants claiming the exclusive right of fishing for eels in Lough Neagh grants by the Crown to the respondents' predecessors in 1605 and later were put in and evidence was given as to the receipt of rents by those predecessors from their lessees of the fishery. There was also evidence that the public had for centuries as of right and without interruption fished for eels in Lough Neagh, which was non-tidal :—

Held by the Earl of Halsbury and Lords Ashbourne, Macnaghten, and Dunedin, that the respondents were entitled to the exclusive right claimed and to an injunction restraining the appellants from fishing.

Held by Earl Loreburn L.C. and Lords Shaw of Dunfermline and Robson, that there was no satisfactory evidence to shew any actual possession or any right in the Crown or its grantees to the exclusive fishery claimed, and that the action did not lie.

Decision of the Irish Court of Appeal [1909] 1 I. R. 237, affirmed. JOHNSTON *v.* O'NEILL **H. L. (I.) 552**

2. —— *Prescription in a Que Estate—Profit à prendre in alieno solo—Presumption of Legal Origin.*

A prescription in a que estate for a profit à prendre in alieno solo without stint and for commercial purposes is unknown to the law.

Freeholders in parishes adjoining the river Wye had been in the habit of fishing a non-tidal portion of the river for centuries, not by stealth or indulgence, but openly, continuously, as of right and without interruption, not merely for sport or pleasure, but commercially, in order to sell the fish and make a living by it. Riparian proprietors claiming to be owners of the bed of the river brought an action of trespass against the freeholders for fishing :—

Held by the Earl of Halsbury and Lords Macnaghten, Gorell, and Kinnear, that a legal origin for the right claimed by the freeholders could not be presumed, and that the action lay.

Held by Earl Loreburn L.C. and Lords Ashbourne and Shaw of Dunfermline, that a lawful

FISHERY—*continued.*
origin for the exercise of the freeholders' claim ought to be presumed, and that the action did not lie.
Decision of the Court of Appeal [1908] 2 Ch. 397, affirmed. HARRIS *v.* EARL OF CHESTERFIELD - - - - - - **H. L. (E.) 623**

—— Rights of fishing—River navigable and floatable—Exclusive right of the Crown to fishing - - - - - - **489**
See PRIVY COUNCIL APPEALS. 6.

GAS—Gas company—Sale and purchase of the undertaking as a going concern — Statutory powers assigned—Calculation of purchase-money - - - **506**
See PRIVY COUNCIL APPEALS. 3.

—— Measure of damages—Conveyance of gas leases and wells — Reservation by vendors—Construction—Breach—Laws of Ontario - - - - - - **105**
See PRIVY COUNCIL APPEALS. 16.

GOODS—Sale of.
See under SALE OF GOODS.

GRATUITY — Public service on retirement, Gratuity for — Law of New South Wales - - - - - - - **381**
See PRIVY COUNCIL APPEALS. 26.

HIGHWAY—Construction—Canadian Railway Act, 1906 — Powers of the Railway Board - - - - - - - **461**
See PRIVY COUNCIL APPEALS. 18.

HOUSE OF LORDS—Criminal appeals—Practice —Appeal to House of Lords—Application to Attorney-General for certificate —Printing papers - - - - **47**
See CRIMINAL LAW.

HUSBAND AND WIFE — Joint will — Community of property — Construction — Gift of usufruct for life to wife and dominium to the son - - - **753**
See PRIVY COUNCIL APPEALS. 24.

—— Undue influence—Duty of solicitor acting for wife — Wife's title in equity to relief - - - - - - - **120**
See PRIVY COUNCIL APPEALS. 7.

INCEST—Appeal—Evidence to prove previous relations—Admissibility - - **47**
See CRIMINAL LAW.

INCOME TAX.
See under REVENUE.

INDEMNITY—Contract, Breach of—Damages—Indemnity against loss - - **301**
See PRIVY COUNCIL APPEALS. 19.

—— Workmen's compensation—Injury to workman from negligence of fellow workman
See EMPLOYER AND WORKMAN. 1. **5**

INJUNCTION — Trade — Passing off — Abortive patent—Utility—Get-up serving useful purpose — Deception of ultimate purchaser - - - - - - - **693**
See TRADE.

INSURANCE (MARINE) — *Non-disclosure to Insurer of Material Facts—Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 17, 18, 19, 33, 39.

By s. 18 of the Marine Insurance Act, 1906, "(1.) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured. . . . . If the assured fails to make such disclosure, the insurer may avoid the contract; (2.) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk"; and by s. 19, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer every material circumstance which is known to himself.

Shipowners brought an action to recover for a total loss under policies of insurance on the hull of the ship during a specified voyage. The insurances were effected through the agency of the managing owner of the vessel. It appeared that twenty-two years had elapsed since the master of the vessel had been at sea, he having during that time been engaged as a stevedore; that he had lost his last ship and his certificate had been suspended; that the hull was largely over-insured, having regard to its market value, and that there were insurances on gross freight and disbursements. With regard to part of these disbursements there was no insurable interest and the insurance was effected by a p.p.i. or "honour policy." The managing owner, to whom money was due from the ship, had also taken out for his own protection "honour policies" to a large amount on disbursements:—

Held, first (Lord Shaw of Dunfermline doubting), affirming the decisions of the Court of Session, 1910 S. C. 1072, that there was no duty on the part of the owners to inform the insurers of the past history of the master, and that the omission to disclose the circumstances relating to his career did not constitute the non-disclosure of a material circumstance; but secondly, reversing the decisions of the Court of Session, that the omission to disclose the facts relating to the over-insurance of the vessel and the existence and amount of the honour policies did amount to the non-disclosure of material circumstances, and that the contract of insurance was voidable by the insurers. THAMES AND MERSEY MARINE INSURANCE COMPANY *v.* "GUNFORD" SHIP COMPANY. SOUTHERN MARINE MUTUAL INSURANCE ASSOCIATION, LIMITED *v.* "GUNFORD" SHIP COMPANY
H. L. (Sc.) 529

JUDICATURE ACT — Shipping — Collision — Damage—Both ships to blame—Limitation of liability—Cargo owner - **16**
See SHIPPING. 1.

JURISDICTION—Employer and workman, Disputes between—Jurisdiction of Court of summary jurisdiction to adjust and set off - - - - - - - **641**
See EMPLOYER AND WORKMAN. 6.

—— Old age pensions.
See under OLD AGE PENSION.

LAKE — Fishery — Navigable non-tidal lake — Public user—Prescription—Evidence—Crown grants - - - - - **552**
See FISHERY. 1.

LANDLORD AND TENANT—*Compensation for Improvements—Notice of Claim — Agricultural Holdings (Scotland) Act*, 1883 (46 & 47 *Vict. c.* 62), *ss.* 5, 36—*Agricultural Holdings Act*, 1900 (63 & 64 *Vict. c.* 50), *s.* 2, *sub-s.* 2.

By the Agricultural Holdings Act, 1900, ss. 1, 10, where a tenant has made on his holding any improvement comprised in the First Schedule to this Act, he shall, subject in Scotland to the Agricultural Holdings (Scotland) Act, 1883, "and in this Act mentioned, be entitled, at the termination of a tenancy, on quitting his holding to obtain from the landlord as compensation under the said Acts for the improvement such sum as fairly represents the value of the improvement to an incoming tenant." By s. 2, sub-s. 2, any claim by a tenant for compensation under the Agricultural Holdings (Scotland) Act, 1883, or "this Act in respect of any improvement comprised in the First Schedule to this Act shall not be made after the determination of the tenancy."

The respondent, who was a tenant farmer of the appellant, gave notice in the terms of his lease of his intention to terminate his tenancy at November 28, 1908. Upon November 9, 1908, he sent to the appellant notice of his claim for compensation for improvements, in the terms of the Agricultural Holdings (Scotland) Acts, 1883 to 1900, and upon November 26 sent an amended claim. An arbiter was appointed, but the appellant applied for an interdict to prevent the arbiter from acting, on the ground that the respondent had lost his right to compensation by virtue of the following provision embodied in the lease: "Provided always that no claim for compensation under the said Acts, or under these conditions, shall be made by the tenant later than one month prior to the determination of the tenancy":—

Held, affirming the decision of the Second Division of the Court of Session (1910) 48 S. L. R. 207; 1911 S. C. 292, that the clause in the agreement was void; for it attempted to deprive the respondent of the right to compensation under the Act of 1900, under which he was entitled to make his claim up to the last day of the tenancy. CATHCART *v.* CHALMERS
H. L. (Sc.) 246

LEASE—Mining lease—Cession to trustees by way of mortgage—Registration—Laws of Natal - - - - - - **140**
See PRIVY COUNCIL APPEALS. 25.

LETTERS PATENT—in respect of lands did not convey fishing rights—Construction
See PRIVY COUNCIL APPEALS. 6. **489**

LICENSING ACTS — Income tax — Profits of brewery—Tied licensed house—Compensation levy - - - - - **150**
See REVENUE.

LIEN—Stock Exchange—Broker and client—General lien - - - - - **419**
See STOCK EXCHANGE.

LIMITATION OF LIABILITY — Shipping — Collision — Damage — Both ships to blame—Cargo owner - - - **16**
See SHIPPING. 1.

LOCUSTS—Swarm of—Action for damages—Landowner's right of self-protection
See PRIVY COUNCIL APPEALS. 21. **355**

LONDON—*Buildings—General Line of Buildings in Street — Buildings erected beyond the General Line — Consent of the Metropolitan Board of Works—Alteration of General Line of Buildings—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75 (*repealed*) —*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 27, 216.

In part of a London street there were old houses built before 1862. Between 1862 and 1894, with the consent of the Metropolitan Board of Works under s. 75 of the Metropolis Management Amendment Act, 1862, shops of one storey were built in front of the old houses and between them and the pavement line of the street. Upon an application by the owners of the shops in pursuance of s. 22 of the London Building Act, 1894, the superintending architect certified that the frontage line of the old houses formed the general line of buildings in that part of the street. The tribunal of appeal varied that certificate by determining that the frontage line of the shops was the general line of buildings in that part of the street:—

Held, without expressing any opinion upon the construction of ss. 27 and 216 of the London Building Act, 1894, that the Metropolitan Board of Works had not altered the old general building line by consenting to the erection of the shops.

Decision of the Court of Appeal, reported as *London County Council* v. *Metropolitan Railway Company* [1909] 2 K. B. 317, affirmed. FLEMING *v.* LONDON COUNTY COUNCIL. METROPOLITAN RAILWAY COMPANY *v.* LONDON COUNTY COUNCIL - - - - - - **H. L. (E.) 1**

MANCHESTER — Costs—Solicitor—Taxation — Non-contentious business—Jurisdiction —Proper officer—District Registrar of Manchester - - - - - - **688**
See PRACTICE.

MANITOBA—Laws of - - - - - **735**
See PRIVY COUNCIL APPEALS. 13.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MEMORANDUM AND ARTICLES OF ASSOCIATION—Company.
See under COMPANY.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

MINES—*Railway—Mines of Coal, Ironstone, Slate, and other Minerals—Fireclay—Railways Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 33), *s.* 70—*Railways Clauses Consolidation Act*, 1845 (*England*) (8 & 9 *Vict. c.* 20), *s.* 77.

"Minerals," which under s. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845, are excepted from the conveyance of lands purchased by railway companies :—

Held, affirming the decision of the First Division of the Court of Session, 1910 S. C. 951, to include seams of fireclay, distinguished from ordinary clay by containing a large proportion of refractory substances, which make it valuable for the manufacture of bricks capable of resisting high temperatures. CALEDONIAN RAILWAY COMPANY *v.* GLENBOIG UNION FIRECLAY COMPANY - - - - - - **H. L. (Sc.) 290**

—— Mining lease—Cession to trustees by way of mortgage—Registration—Laws of Natal - - - - - - - **140**
See PRIVY COUNCIL APPEALS. 25.

MONTREAL—Montreal City Charter—Construction—Penalties - - - - **520**
See PRIVY COUNCIL APPEALS. 14.

MORTGAGE—Mining lease—Cession to trustees by way of mortgage—Registration—Laws of Natal - - - - **140**
See PRIVY COUNCIL APPEALS. 25.

—— Redemption—Suit for redemption of mortgage—Power of sale—Duty of mortgagees—Alleged inadequacy of price—Purchasers not charged with collusion - - - - - - **722**
See PRIVY COUNCIL APPEALS. 11.

MOSQUE—Possessory action—Ouster of trustee of a mosque—Decree for restoration of possession without proof of title - **746**
See PRIVY COUNCIL APPEALS. 23.

NATAL—Laws of.
See under PRIVY COUNCIL APPEALS.

NEGLIGENCE—*Savage Animal — Liability of Owner.*

The respondent, who owned a savage horse which he knew to be dangerous to mankind, put it, without giving any warning, into a field of which he was the occupier and which he knew the public were in the habit of crossing without leave on their way to a railway station. The appellant in crossing the field was attacked, bitten, and stamped on by the horse. The county court judge found as a fact that the respondent was guilty of negligence in putting a horse which he knew to be ferocious into a field which he knew to be habitually crossed by the public, and gave judgment for the appellant and 100*l.* damages :—

Held, that the effect of the learned judge's finding being that the appellant was in the field without express leave, but with the permission of the respondent, the appellant was entitled to recover.

Decision of the Divisional Court [1909] 2 K. B. 433, and decision of the Court of Appeal [1910] 1 K. B. 173, reversed. LOWERY *v.* WALKER - - - - - - **H. L. (E.) 10**

—— Collision, Action for negligence resulting in a—Plaintiff a trespasser and not a passenger—No breach of duty or cause of action - - - - - - **361**
See PRIVY COUNCIL APPEALS. 17.

—— Shipping—Collision—Tug and tow—Negligence of tug—Non-liability of tow **30**
See SHIPPING. 2.

—— Workmen's compensation—Injury to workman from negligence of fellow workmen - - - - - - - - **5**
See EMPLOYER AND WORKMAN. 1.

NEW SOUTH WALES—Laws of.
See under PRIVY COUNCIL APPEALS.

NEW ZEALAND—Laws of.
See under PRIVY COUNCIL APPEALS.

OLD AGE PENSION—*Decision of Local Pension Committee—Statutory Conditions—Jurisdiction—"Final and conclusive"—Old Age Pensions Act*, 1908 (8 *Edw.* 7, *c.* 40), *s.* 7, *sub-s.* 2.

An applicant for an old age pension who had not in fact attained the age of seventy was awarded a pension by the local pension committee and was paid the pension. No appeal against the award was brought in the manner prescribed by the Old Age Pensions Act, 1908. Afterwards new facts relating to the age of the pensioner came to the knowledge of the pension officer, who thereupon raised a question in the manner prescribed by the Act to the effect that the pensioner was not entitled to the pension as she was not yet seventy. The local pension committee decided to continue the pension, and the pension officer appealed to the central pension authority, who deprived the pensioner of the pension :—

Held, that the original decision of the local pension committee was invalid, as the applicant had not fulfilled the statutory condition as to age, and that notwithstanding s. 7, sub-s. 2—which enacts that "the decision of the local pension committee on any claim or question which is not referred to the central pension authority . . . . shall be final and conclusive"—it was competent for the pension officer to raise the question and for the central pension authority to deprive the pensioner of the pension on the ground of her real age.

Decision of the Irish Court of Appeal [1911] 2 I. R. 88, affirmed. MURPHY *v.* THE KING **H. L. (I.) 401**

ONTARIO—Laws of.
See under PRIVY COUNCIL APPEALS.

PASSING OFF — Trade — Abortive patent — Utility—Get-up serving useful purpose —Deception of ultimate purchaser— Injunction - - - - - - **693**
See TRADE.

PATENT — Infringement — Sales of patented articles to jobbers and dealers—Condition imposed upon dealer—Laws of Australia - - - - - - **336**
See PRIVY COUNCIL APPEALS. 2.

—— Trade—Passing off—Abortive patent—Get-up serving useful purpose—Deception of ultimate purchaser—Injunction **693**
See TRADE.

PENALTIES — Montreal City Charter — Construction - - - - - - **520**
See PRIVY COUNCIL APPEALS. 14.

PENSION—Old age pensions.
See under OLD AGE PENSION.

POOR RATE.
See under RATES.

POSSESSORY ACTION—Ouster of trustee of a mosque — Decree for restoration of possession without proof of title - **746**
See PRIVY COUNCIL APPEALS. 23.

POWER OF APPOINTMENT—Invalid exercise of—Succession—Election - - **217**
See SCOTTISH LAW.

PRACTICE—*Costs — Taxation — Non-contentious Business—Jurisdiction—Proper Officer—District Registrar of Manchester—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Rules of the Supreme Court, Order XXXV., r.* 6A ; *Order LXI., r.* 1B ; *Order LXV., r.* 26A.

Application having been made, by originating summons in the Manchester District Registry, before the amendment in July, 1910, of Order XXXV., r. 6A, to a judge of the King's Bench Division sitting at Manchester for an order referring a bill of costs of a solicitor for non-contentious business to the district registrar for taxation :—

Held, that "the proper officer" to tax the bill within s. 37 of the Solicitors Act, 1843, was not the district registrar, but a Master of the Supreme Court.

Decision of the Court of Appeal [1910] 2 K. B. 713, affirmed. STEAD *v.* SMITH
H. L. (E.) **688**

PRESCRIPTION — Fishery — Navigable non-tidal lake—Public user—Evidence—Crown grants - - - - **552**
See FISHERY. 1.

—— Fishery—Prescription in a que estate—Profit à prendre in alieno solo—Presumption of legal origin - - **623**
See FISHERY. 2.

PRESUMPTION — Fishery — Prescription in a que estate—Profit à prendre in alieno solo—Presumption of legal origin - **623**
See FISHERY. 2.

PRINCIPAL AND AGENT—Sale of goods—Authority of agent to receive payment in cash - - - - - - - **279**
See SALE OF GOODS. 1.

PRIVY COUNCIL APPEALS—AUSTRALIA—*Contribution—Suit for—Trustees under Two different Wills—Discretionary Power to provide Maintenance for the same Legatee—Separate and Independent Obligation—No Right of Contribution.*

Discretionary power was given to the appellants as trustees under a will to pay to the testator's daughter 800*l.* a year, the unpaid portion thereof to fall into the residue of his estate. A like power was given to one of the appellants and a respondent as trustees under the will of her sister to pay such sums as they might think fit in and towards her maintenance, the residue of the income of the testatrix's estate to be paid to her nephew, the corpus to go in equal shares to his children on his death. The trustees under the first will paid 400*l.* a year to the daughter, but on the death of the testatrix they reduced the allowance to 100*l.* a year, while the trustees of the second will paid from 700*l.* to 800*l.* a year.

In a suit by the said nephew and the trustee of his insolvent estate for an order that the said daughter's maintenance should be provided for by a proportionate contribution from the two estates :—

Held, that there was no common obligation and no right to contribution. The trusts were different in their terms to be exercised at the discretion of different trustees, and the resulting obligations were separate and independent. SMITH *v.* COCK - - - - **P. C. 317**

2. —— *Patent—Commonwealth Patents Act*, 1903, *s.* 62—*Sales of Patented Articles to Jobbers and Dealers—Infringement by Dealer of Patentee's Rights — Rights of Patentee — Condition imposed upon Dealer.*

The appellants held patents granted under the Commonwealth Patents Act, 1903, for improvements in phonographs, sound records or blanks, and in the production of the two latter articles, and under s. 62 were entitled by way of monopoly by themselves, their agents and licensees, "to make, use, exercise and vend the invention . . . . in such manner as to him seems meet."

It appeared that their course of business was to sell their patented articles to jobbers, who in turn sold to dealers, the dealers' contracts being made with the appellants. The main object of those contracts was to prevent undercutting of trade prices and also the introduction of rival goods by way of exchange. The respondent held various dealers' contracts made in April and May, 1906, and was entered on the appellants' dealers' list under a dealers' contract which rendered him liable to be withdrawn therefrom on violating any of the conditions of sale therein expressed or any other reasonable conditions which might from time to time be imposed. If so withdrawn, he undertook that he would in no way "handle, sell, or deal in or use, either directly or indirectly," the patented articles

unless authorized to do so in writing by the appellants.

In an action to restrain the respondents, whom the appellants had removed from their dealers' list, from (1.) acting in breach of contract, (2.) infringing their patent rights, their Lordships approved the finding by the High Court that no violation by the respondent of his contract had been established :—

Held, therefore, that he was free from those contractual obligations to the appellants, resulting from the withdrawal of his name from the dealers' list, which imposed upon him a comprehensive restraint on his conduct as a trader. But *held*, also, that the appellants were entitled under the statute to impose conditions in transactions of making, using, and vending their patented articles ; that knowledge of those conditions was brought home to the respondent by the said contract ; and that he could not deal therewith as ordinary articles of commerce free from the conditions so imposed. NATIONAL PHONOGRAPH COMPANY OF AUSTRALIA, LIMITED *v.* MENCK - - - - **P. C. 336**

3. —— *Western Australia — Gas Company — Perth Gas Company's Act*, 1886, *s.* 50 — *Construction—Sale and Purchase of the Undertaking as a Going Concern—Statutory Powers assigned—Calculation of Purchase-money.*

Sect. 50 of the Perth Gas Company's Act of 1886 empowered the respondents "to purchase all the land buildings works hereditaments lamps pipes stock and appurtenances of and belonging to the company in the name and on behalf of the corporation upon giving to the directors six calendar months' notice in writing of such intention so to do and upon such terms and conditions as shall and may be mutually agreed upon between the directors and the corporation," but in case of dispute respecting such purchase arbitration to be resorted to as prescribed "to determine what amount of purchase-money shall be paid."

The Act extended the powers and privileges theretofore possessed by the company, authorizing it to construct and when constructed to own and use works proper and necessary for the manufacture and supply of gas at a prescribed limit as to price ; and also conferred upon it all the powers usually conferred upon gas companies, no limit being placed on the amount of their profits, all to be exercised over a vast area of which the city of Perth formed a very small portion. The Act also confirmed all the mortgages and securities already given by the company and made them a valid charge on its property and assets, authorized the increase of its capital and the issue of debentures charged on its undertaking, and sanctioned the purchase thereof by trustees as a due investment of trust moneys :—

Held, that on the true construction of s. 50, in the absence of an express provision to the contrary, the transaction which it contemplates is the sale and transfer with the consent of the incumbrancers to the respondents of the appellants' commercial undertaking as a going concern ; not only of the physical apparatus by

which they carry on their business, but also of their statutory powers ; and that the whole must be included in the calculation of the purchase-money. PERTH GAS COMPANY *v.* CITY OF PERTH CORPORATION - - - **P. C. 506**

4. —— *Revenue—Dividend Duties—Western Australia Dividend Duties Act*, 1902 (2 *Edw.* 7, *No.* 32), *ss.* 5, 6, 13, *and* 15—*Construction—Company—Duty on Dividends declared.*

Under the Western Australia Dividend Duties Act, 1902 (2 Edw. 7, No. 32), ss. 5 and 6, companies which like the appellants carry on their business in Western Australia exclusively are not bound to pay duties in respect of any portion of their profits save that which they devote to the payment of dividends declared.

Sect. 13 enacts that the company may deduct from the dividends and retain for its own use the sums payable for duties imposed thereon ; and s. 15 enacts that "when a dividend is distributed before the duty payable in respect thereof is deducted and paid, the duty shall be a debt due by the person receiving the dividend to His Majesty" :—

Held, that to make sense of s. 15 the words "deducted and paid" must be read as "deducted or paid," and that then the section would bear the reasonable and just meaning that where the duties have been paid by the company, and also where though not paid they have been deducted by the company from the dividends declared, the shareholders are not to be liable as debtors to the Crown in respect of them. GOLDEN HORSESHOE ESTATES COMPANY *v.* THE CROWN **P. C. 480**

5. —— **CANADA**—*Company—Sale of Railway to a Company by its Promoters—Purchase authorized by its Incorporating Act—Promoters the only Shareholders — Sale and Purchase upheld as intra vires the Company.*

A syndicate of four persons procured a Quebec Act incorporating a railway company which they had promoted and subscribed for $300,000 of the company's shares (being all that were issued), and were with others whom they had qualified elected directors. They then purchased a railway themselves, and the incorporated company, being empowered so to do by their Act, purchased the said railway from them for $648,000, paying for it by taking credit for the said subscription and acknowledging indebtedness to the said four persons of the balance of $348,000 in equal shares. On the insolvency of the said incorporated company and of another company with which it had been amalgamated their railways were sold, and the respondent company, to whom the syndicate's claim had been assigned, claimed to rank as creditors against the proceeds of sale :—

Held, that the claim must be allowed. The incorporating Act authorized the purchase, and whether or not the price was excessive every one interested in the capital of the company concurred in the purchase with full knowledge of all the circumstances.

Salomon v. *Salomon* [1897] A. C. 22, followed. ATTORNEY-GENERAL FOR CANADA *v.* STANDARD TRUST COMPANY OF NEW YORK - **P. C. 498**

PRIVY COUNCIL APPEALS—*continued.*

6. —— *Fishing, Rights of—River navigable and floatable—Exclusive Right of the Crown to Fishing—Letters Patent in respect of Lands did not convey Fishing Rights—Construction.*

The appellants were grantees of lands on both sides of a river which was shewn by the evidence to be navigable and floatable at such locality and from thence to its mouth :—

Held, that the right of fishing in the river vested exclusively in the Crown, and that, as the letters patent to the appellants in 1883 granting the said lands were plain and unambiguous in their terms, and did not specifically grant rights of fishing in the river opposite thereto, the patentees could not claim such rights under previous or subsequent correspondence as enlarging the terms of the grants, or by reason of such rights having been exercised by them continuously from the date of the patents without hindrance or interference. WYATT *v.* ATTORNEY-GENERAL OF QUEBEC - - - **P. C. 489**

7. —— *Husband and Wife—Undue Influence—Duty of Solicitor acting for the Wife—Wife's Title in Equity to Relief—Law of Upper Canada.*

In an action by a wife living with her husband against the appellant bank to set aside a series of transactions in relation to a company spreading over eight years, and resulting in her surrendering to the bank all her extensive estate, real and personal, and in her being left without any means of her own, it appeared that the plaintiff, who was a confirmed invalid, acted throughout in passive obedience to her husband's directions, had no means of forming an independent judgment, and at the trial repudiated any misrepresentation or undue influence by her husband, alleging that she acted of her own free will to relieve her husband's distress ; and that the solicitor who acted in all or most of the transactions was solicitor to the bank and to the husband, and was a director, secretary, shareholder, and creditor of the company :—

Held, affirming the judgment of the Supreme Court, but for different reasons, that these transactions could not stand, the wife being in fact wholly under the husband's influence and the solicitor in a position in which he could not advise fairly.

Cox v. *Adams* (1904) 35 Can. S. C. R. 393, so far as it holds that no transactions between husband and wife for the husband's benefit can be upheld unless the wife is shewn to have had independent advice, disapproved. BANK OF MONTREAL *v.* STUART - - - **P. C. 120**

8. —— *Railway — Canadian Railway Act*, 1903, *ss.* 42, 242—*Action for Damages—Removal of a Siding constructed for Convenience of Traffic—Limitation—Railway Board's Finding of Fact conclusive.*

The appellant company having constructed a spur track or siding into the respondents' yard for the convenience of traffic, in November, 1904, cut it off, and on February 19, 1906, the Board of Railway Commissioners, under ss. 214 and 253 of the Dominion Railway Act of 1903, directed its restoration, which was carried out on September 28, 1906. In an action for damages for breach by the appellants of their statutory obligations between October 31, 1904, and September 28, 1906 :—

Held, that under s. 42 of the Act of 1903 the order of the Board, affirmed as it was by the Supreme Court on appeal, was conclusive as to the question of fact, that the facilities previously enjoyed by the respondents were of a kind to which they were entitled.

Held, also, that the special provisions of the Act as to one year's limitation (see s. 242 substantially re-enacted by s. 306 of the Railway Act of 1906) relate to damages sustained by the construction or operation of the railway and do not apply to the refusal of facilities by means of a siding outside the railway as constructed, which is not an act done in the operation of the railway. CANADIAN NORTHERN RAILWAY COMPANY *v.* ROBINSON - - - **P. C. 739**

9. —— *Alberta — Railway — Dominion Act* 44 *Vict. c.* 1—*Railway Construction Contract, cl.* 16—*Exemption of Lands from Taxation—Twenty Years from Crown Grant—Until sold or occupied—Construction.*

The lands in suit within the North-West Territories formed part of a land subsidy earned by the respondents under their railway construction contract in 1881 with the Dominion, ratified by Dominion Act 44 Vict. c. 1. By clause 16 it was provided that the said lands should be free from taxation as therein described "until they are either sold or occupied . . . . for twenty years after the grant thereof from the Crown" :—

Held, in two actions brought to enforce two separate claims on behalf of the Province of Alberta, which was carved out of the North-West Territories and established in 1905, to tax the said lands, that on the true construction of the contract they were exempt.

It was admitted that the lands had never been occupied ; though there had been three agreements for sale, they had all been duly avoided and annulled in pursuance of authority contained therein. The earliest grant to the company from the Crown by letters patent under the Great Seal was in 1903, and the period of exemption ran at the earliest from that date and not from the identification by the Surveyor-General in 1884 of the said lands as part of the appellants' subsidy.

Rural Municipality of Cornwallis v. *Canadian Pacific Ry. Co.* (1890) 19 S. C. R. 702, and *North Cypress* v. *Canadian Pacific Railway* (1903) 35 S. C. R. 550, approved. THE KING *v.* CANADIAN PACIFIC RAILWAY COMPANY. MINISTER OF PUBLIC WORKS OF PROVINCE OF ALBERTA *v.* CANADIAN PACIFIC RAILWAY COMPANY - - - - - - **P. C. 328**

10. —— *British Columbia—Ejectment, Action of—Validity of Dominion Lease to Plaintiffs—Deceit on the Crown—Plaintiffs without Notice of previous inconsistent Grant (if any).*

The appellants claimed to have been in possession of the property in suit under a grant from the Dominion Government on June 8, 1887, of the use of land contiguous thereto as a park,

PRIVY COUNCIL APPEALS—*continued.*

and also under a lease from the Dominion dated November 1, 1908, for ninety-nine years, which did not expressly include the property in suit and was moreover subject to any existing leases of portions of the said land :—

Held, in a suit by the respondents, who derived title under a Dominion lease dated February 14, 1899, that the appellants as defendants in possession could not object thereto as not having been granted under the Great Seal, since that point had not been put forward in the Courts below ; nor on the ground that it had been obtained by deceit practised on the Crown, since the respondents were without notice, actual or constructive, of a previous Crown grant (if any) to the appellants inconsistent therewith. CITY OF VANCOUVER *v.* VANCOUVER LUMBER COMPANY - - - - - - - **P. C. 711**

11. —— *Mortgage—Suit for Redemption of Mortgage—Power of Sale—Duty of Mortgagees —Alleged Inadequacy of Price—Purchasers not charged with Collusion—Appeal from British Columbia.*

The Court of Appeal found that a sale by the assignees of a mortgage in the exercise of a power of sale contained therein was invalid as against the mortgagor plaintiffs and decreed redemption, on the ground that there had been reckless disregard of their interests in the conduct of the sale. It appeared that the pleadings contained no charge of fraud or collusion or bad faith against the defendant purchasers, that there had been no notice before trial that inadequacy of price would be relied upon as evidence thereof, and that the purchasers had accordingly given no counter-evidence of its sufficiency :—

Held, that the finding of the first Court to the effect that the sale was valid and regular ought not to have been reversed, and that the failure in the circumstances of the purchasers to produce counter-evidence did not justify a finding in effect that the sale was fraudulent. HADDINGTON ISLAND QUARRY COMPANY *v.* HUSON - - - - - - - **P. C. 722**

12. —— *Water—Grant of Water Rights in Public Lands conveyed to the Dominion—Provincial Legislation relating thereto ultra vires —British Columbian Water Clauses Consolidation Act*, 1898 (61 *Vict. c.* 190), *s.* 4.

Certain water rights in lands known as the Railway Belt for British Columbia were granted to the appellants by Water Commissioners who purported to act under the British Columbian Water Clauses Consolidation Act, 1897 (61 Vict. c. 190), s. 4.

On an information filed by the Dominion claiming that the grant was invalid and conveyed no interest to the appellants :—

Held, that (1.) the Railway Belt having been conveyed by the Province to the Dominion by provincial statutes for railway purposes as contemplated by the 11th article of the Terms of Union, it resulted that the proprietary rights therein, which before the transfer belonged to the Crown in right of the Province, after the transfer belonged to the Crown in right of the

PRIVY COUNCIL APPEALS—*continued.*

Dominion for a public purpose ; (2.) being public lands both before and after the transfer, they were public property within the meaning of s. 91 of the British North America Act, 1867, and as such were under the exclusive legislative authority of the Dominion Parliament ; (3.) the above Water Clauses Consolidation Act could not affect the waters upon those lands and on its true construction (see s. 2) did not purport to do so. BURRARD POWER COMPANY *v.* THE KING - - - - - - - - **P. C. 87**

13. —— *Manitoba — Extradition — Extradition Act, R. S. C.*, 1906, *c.* 155, *s.* 10— *Proof of Requisition not a Condition of Arrest or Committal—Extradition Treaty with Russia.*

Under art. IX. of the Extradition Treaty with Russia, 1886, after a requisition in due form it is obligatory on the authorities to arrest the fugitive. The article does not provide that there shall be no arrest till after requisition ; and is not inconsistent with s. 10 of the Extradition Act (R. S. C., 1906, c. 155). ATTORNEY-GENERAL FOR CANADA *v.* FEDORENKO **P. C. 735**

14. —— *Montreal City Charter* (62 *Vict. c.* 58), *s.* 14, *art.* 338—*Construction—Penalties.*

Art. 338 of the Montreal City Charter (62 Vict. c. 58) provides " that every member of the council who . . . . authorizes any expenditure of money exceeding the amount previously voted and legally placed at the disposal of the council or any committee " shall incur the penalties inflicted by the judgment under appeal. The appellants, being the finance committee of the council, acting under the instructions of the council, authorized the expenditure required to defray the cost of the city's representation by its mayor at the Paris fêtes. At the time when provision was made to defray this cost, the appropriation prescribed by art. 334 had been duly voted and the required funds were available and legally at the disposal of the city. A dissenting ratepayer sued the appellants under art. 338 :—

Held, that the appellants had not contravened art. 338 in any respect. The case was not one of unauthorized expenditure by them. It was expenditure under the authority of the council, and even if there had been some irregularity in procedure, which was by no means clear, it could not justify the infliction of penalties attached by art. 338 to acts and defaults of a very different description. LAPOINTE *v.* LARIN - - - **P. C. 520**

15. —— *Ontario—Bank—Deed of Agreement between Two Banks—Construction—Assignment in Trust—Bank Act, R. S. C.*, 1906, *c.* 29, *ss.* 99-111.

By deed dated October 13, 1906, an insolvent bank, in conformity with a resolution of its directors of even date, in effect assigned to the respondent bank unconditionally its call and current loans and securities and its interest in all debts and choses in action which it might possess or be entitled to, and authorized the respondent bank to act for and represent it and to receive and grant acquittances for all moneys

payable in respect thereof, and agreed to discontinue its business and authorized the respondent bank to enter its premises and offices and use the same, together with its books and other appliances, for the conducting of banking business. The deed further defined the remuneration which the respondent bank should receive, and provided for its payment on its fulfilment of the terms and conditions of the deed of a sum of money in consideration of "the indirect benefit thereby accruing" to it.

On an application by the appellant, who had been placed on the list of contributory shareholders in the insolvent bank, for a direction to the liquidator to contest the claim of the respondent bank under the deed, it was contended that the deed was in effect a sale of the whole or part of the assets of the insolvent bank, and as such ultra vires and void under the Bank Act, R. S. C., 1906, c. 29, the conditions under which the Act authorized a sale by one bank to another not having been complied with :—

Held, that on the true construction of the deed, having regard to the resolution of the directors and the surrounding circumstances, there was nothing from which it could be inferred that a sale or purchase was within the contemplation of either party. The assets of the insolvent bank were assigned to the creditor bank, not for its own profit, but for the purpose of discharging the assignor's obligations. The clause which provided for payment for an indirect benefit did not amount to a sale and purchase of goodwill. McFARLAND *v.* BANK OF MONTREAL AND ROYAL TRUST COMPANY **P. C. 96**

16. —— *Gas—Measure of Damages—Conveyance of Gas Leases and Wells — Reservation by Vendors of sufficient Gas to work their Plant—Construction—Breach—Substituted Gas obtained free of Cost—Nominal Damages—Appeal from Ontario.*

By agreement and conveyance executed in April, 1891, by the plaintiffs and one of two appellant companies, and afterwards in 1894 assigned to the other of them, the plaintiffs, who carried on an extensive business of quarrying stone and burning lime on their property, sold, and the two companies successively acquired, various gas leases, gas grants, and gas wells theretofore held by the plaintiffs. These gas leases conferred on the holders the exclusive right to explore and drill the lands to which they related, but which were not demised thereby, for subterranean or natural gas which had been discovered to be useful both as an illuminant and as fuel, and to set up and use the necessary machinery for reducing the said gas into their possession and control. The transaction included the following clause :—"It is understood that the parties of the first part reserve gas enough to supply the plant now operated or to be operated by them on said property."

Shortly after the assignment of 1894 the assignee company cut off the supply of gas theretofore enjoyed by the plaintiffs under the said reservation clause and refused further supply ; and the plaintiffs thereupon procured

the gas required for their plant by the acquisition from independent sources of other gas leases and by the construction of works necessary to obtain the same.

In an action for damages caused by the deprivation of gas against both companies :—

Held, that on the true construction of the reservation clause the companies were successively bound to supply from the gas obtained by them to the plaintiffs a sufficient amount to operate their plant, varying according to its requirements.

Held, also, overruling the Court below, that the measure of damages recoverable by the plaintiffs was the cost of procuring the gas to which they were entitled and not the price at which the substituted gas when procured could have been sold ; and that, as they had sold the leases and works used in procuring the substituted gas for more than they cost, they were entitled only to nominal damages.

Le Blanche v. *London and North Western Ry. Co.* (1876) 1 C. P. D. 286, approved. ERIE COUNTY NATURAL GAS AND FUEL COMPANY *v.* CARROLL - - - - - **P. C. 105**

17. —— *Negligence—Action for Negligence resulting in a Collision—Plaintiff a Trespasser and not a Passenger—No Breach of Duty or Cause of Action—Appeal from Ontario.*

In an action against the appellant railroad company for damages for personal injuries resulting from collision caused by the negligence of the appellants' servants it appeared that the collision took place on the property of the appellants to which the train carrying the plaintiff, which belonged to another company, had access by their leave and licence. It further appeared that the plaintiff was a trespasser on the appellants' property and also on the said train, which to his knowledge was not at the time in use as a passenger train and in which he had taken up a precarious position on the platform and step of a carriage in disobedience of a by-law of both companies :—

Held, that the appellants were not liable, for no breach of duty had been shewn. GRAND TRUNK RAILWAY COMPANY OF CANADA *v.* BARNETT - - - - - - **P. C. 361**

18. —— *Railway—Canadian Railway Act*, 1906, *s.* 2, *sub-s.* 11, *and s.* 2, *sub-s.* 28 ; *s.* 56, *sub-ss.* 2, 3, *and* 9 ; *s.* 238 — *Powers of the Railway Board — Highway — Construction — Canadian Act* 56 *Vict. c.* 48—*Special Act—Crown—Prerogative Right to grant Special Leave to Appeal.*

The Railway Committee of the Privy Council of Canada in the exercise of powers preserved to it under s. 238 of the Canadian Railway Act, R. S. C., 1906, c. 37, on January 14, 1904, ordered the appellant and respondent railway companies to carry a bridge over their respective lines at Yonge Street in the city of Toronto.

The Railway Board constituted by the Railway Act of 1903, consolidated in 1906, on June 9, 1909, ordered the said two companies to construct an elevated viaduct several miles in

length for the purpose of carrying four of the tracks of their railways through the said city :—

Held, that under the said s. 238 and the amending Act of 1909 (8 & 9 Edw. 7, c. 32), ss. 237 and 238, the Railway Committee and the Railway Board had jurisdiction to make these orders ; the latter of which virtually superseded the former. The evidence shewed that the lines of rails were laid " upon or along or across a highway"—highway being defined by s. 2, sub-s. 11, of the Railway Act, R. S. C., 1906, c. 37, as including " any public road, street, lane or other public way or communication." As regards the respondent company the lines were laid along an esplanade which was deemed a public highway under 28 Vict. c. 24. As regards the appellant company they were laid along a route as to which there was an actual user by the public whether by right or leave and licence express or implied. It was accordingly within the words " public communication," and exposed to the danger from which the public were under s. 238 entitled to be protected.

Held, further, that the Board where it has jurisdiction may in its discretion make any order of this kind for the protection, safety, and convenience of the public, except where it is restricted by s. 3 of the Act of 1906, which enacts that where the provisions of the Act of 1906 and of any special Act passed by the Parliament of Canada relate to the same subject the latter so far as necessary shall override the former. But Canadian Act 56 Vict. c. 48, relied on by the appellants, which is a special Act within the meaning of s. 2, sub-s. 28, of the Act of 1906, does not relate to the same subject as the Act of 1906. The former empowers the companies affected thereby to construct and use certain specified works ; the latter empowers the Railway Board to require railway companies to construct such works as it may deem necessary for the protection and convenience of the public. Effect can be given to both statutes, and s. 3 consequently does not in this case restrict in any way the power of the Board.

An appeal from the order of the Board lies to the Supreme Court under s. 56, sub-s. 2, of the Railway Act, 1906, after the leave prescribed by that section has been obtained, on any question of jurisdiction or law. Under sub-s. 3 the Supreme Court is to determine by its judgment the questions submitted, and under sub-s. 5 to certify its opinion to the Board, which is to make an order in accordance therewith, and that order by sub-s. 9 is declared to be final :—

Held, that the provisions of s. 56 are not sufficient to take away the prerogative of the Crown to grant leave to appeal from the said judgment. CANADIAN PACIFIC RAILWAY COMPANY *v.* TORONTO CORPORATION AND GRAND TRUNK RAILWAY COMPANY OF CANADA **P. C. 461**

19. —— *Quebec — Contract, Breach of — Late Delivery of Goods sold — Measure of Damages—Purchaser entitled only to Indemnity against Loss.*

The general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position as he would have been in if the contract had been performed. In the case of late delivery the measure thereof in order to indemnify the purchaser is the difference between the market price at the respective dates of due and actual delivery of the goods purchased ; but if the purchaser has resold them at a price in excess of that prevailing at the date of delivery he must in estimating his damages give credit therefor.

In an action for damages for breach of contract dated March 13, 1900, to deliver 3000 tons of moist wood pulp between September 1 and November 1 of that year the appellant claimed to recover 27*s.* 6*d.* a ton, the difference between 70*s.*, the market price at the port of delivery on the due date, and 42*s.* 6*d.*, the market price at the same place on the date of actual delivery ; but it appeared that he had sold the goods at 65*s.* a ton, involving a loss to him of only 5*s.* a ton :—

Held, that he was entitled to recover only 5*s.* a ton. As the Court below had on the evidence decreed that amount on 2000 tons only, their Lordships increased the amount by 250*l.* in respect of the remaining 1000 tons together with a further amount as subsequently agreed between the parties. WERTHEIM *v.* CHICOUTIMI PULP COMPANY - - - - - - **P. C. 301**

20. —— *Trade Mark—Extra-provincial Corporation—Canadian Trade Mark and Design Act*, 1879 (42 *Vict. c.* 22)—*Trade Mark—Descriptive Words—*" *Standard* "—*Quebec Act*, 1904 (4 *Edw.* 7, *c.* 34)—*Construction.*

An American company with its headquarters in Pittsburg, which sells its goods in Montreal and throughout the Province of Quebec through an agent acting as a traveller and taking orders, and consigns them direct to the customer, who pays direct to the company, does not thereby carry on business in Quebec within the meaning of Quebec Act 4 Edw. 7, c. 34.

In an action against the defendant company charging that it had infringed the plaintiffs' trade mark, consisting of the word " Standard," and was passing off its goods as and for those of the plaintiffs :—

Held, (1.) that the word " standard," being a common English word having reference to the character and quality of the goods in connection with which it is used and having no reference to anything else, could not be an apt or appropriate instrument for distinguishing the goods of one trader from those of another, and was not a valid trade mark within the meaning of the Canadian Trade Mark and Design Act, 1879 (42 Vict. c. 22), under which the plaintiffs had registered it ; (2.) that on the evidence the defendant company had not passed off the plaintiffs' goods as its own, and the word " standard " had not acquired a secondary signification so as to mean goods manufactured by the plaintiffs when applied to the articles of toilet use the subject of the action. STANDARD IDEAL COMPANY *v.* STANDARD SANITARY MANUFACTURING COMPANY **P. C. 78**

PRIVY COUNCIL APPEALS—*continued.*

21. —— **CAPE OF GOOD HOPE**—*Damages, Action for — Swarm of Locusts — Landowner's Right of Self-protection.*

In an action by the appellant, inter alia, for damage caused by the respondents, who were adjoining proprietors, in that they drove from without his boundary fence a swarm of locusts away from their own lands and in the direction of his cultivated lands :—

Held, that the respondents were entitled to drive the locusts away as a measure of self-protection and were not responsible for the consequences. GREYVENSTEYN *v.* HATTINGH **P. C. 355**

22. —— *Will—Mutual Will—Construction of Codicil—Gift to the two Sons, with a Fidei Commissum in favour of their eldest Sons—Fidei Commissum not to be extended beyond what was clearly expressed—Gift to the eldest Grandsons absolute—Law of Cape Colony.*

It having been decided that on the true construction of a codicil in 1822 to a mutual will by husband and wife in 1812 the two sons of the testators were joint fiduciary heirs in equal shares of the property bequeathed, and that each of them was burdened with a fidei commissum in favour of his eldest son and no others :—

Held, in further litigation after the deaths of their two sons, that the logical result of that decision was that each of the two eldest grandsons became on the death of his father the full and absolute owner of his father's half share free from any further fidei commissum and with power to alienate, there being nothing in the codicil to indicate that on the death of the grandsons the property should revert to the heirs ab intestato of the testators.

De Jager v. *De Jager* (1886) 11 App. Cas. 411, followed. DE JAGER *v.* FOSTER - **P. C. 450**

23. **CEYLON**—*Possessory Action—Ouster of Trustee of a Mosque—Decree for Restoration of Possession without Proof of Title—Ceylon Ordinance* 22 *of* 1871, *s.* 4.

Under Ceylon Ordinance 22 of 1871 a trustee of a mosque in possession for more than the requisite year and a day is entitled to bring a possessory action as a remedy for forcible dispossession. ABDUL AZEEZ *v.* ABDUL RAHIMAN MUDLIYAR - - - - - **P. C. 746**

24. —— *Will—Joint Will of Husband and Wife—Community of Property—Construction—Gift of Usufruct for Life to Wife and Dominium to the Son—Ceylon Ordinance* 15 of 1876, *s.* 26.

By the joint will dated April 27, 1878, of husband and wife married in community of property it was directed that certain properties including the synagogue and cottage in suit "shall be vested in me the testatrix" subject to the condition that "our executors shall not sell or otherwise alienate" the same; "nor shall I the testatrix have the power to sell or otherwise alienate the same or any of them, but I shall have a life interest therein." Under a clause headed "Inheritance upon the death of both of us" the synagogue and cottage were directed to vest in their son. The will also directed that the synagogue "should not be sold or in anywise alienated or incumbered," but should devolve on the lawful heirs of the above-named devisee, and in the absence of any such lawful heirs on the heirs instituted by the will including the said son or his or her lawful heirs. The testator died in 1878; the testatrix in 1907, after adiating the inheritance and accepting benefit under the will; the son in 1882 intestate :—

Held, that according to the true construction of the joint will a bare usufruct and not the dominium was conferred on the testatrix in respect of both properties, and that subject thereto the son took a vested interest in the same, transmissible to his heirs.

Held, also, that under Ceylon Ordinance 15 of 1876, s. 26, the first appellant as the deceased son's surviving spouse notwithstanding her remarriage to the second appellant took by inheritance one half of his property. SAMARADIWAKARA *v.* DE SARAM - - **P. C. 753**

25. —— **NATAL**—*Mining Lease—Cession to Trustees by way of Mortgage—Registration—Natal Law* 19 *of* 1884, *ss.* 2 *and* 3.

By a mining lease dated May 28, 1898, all the coal and ironstone mines within and under certain lands were demised and let for fifty years from May 1, 1898, at a specified rent. Liberty was given to the lessee as ancillary to working the mines to build on the said lands and to exercise very extensive rights over their surface, including rights of exclusive possession with a right of sub-letting the whole or any portion of the premises, and also at the end of each successive period of five years to surrender the lease on giving six months' notice.

By deeds of September 27, 1905, and January 12, 1906, the company which had succeeded to the lessee's title conveyed the leased premises to trustees, charging the same by way of first charge with the repayment of certain debentures in suit which it had created. The lease was ceded and delivered to the trustees in the manner required to effect a mortgage by pledge or deposit; but neither the lease nor its transfer to the company nor either of the said deeds was registered in Natal :—

Held, that in order to create a good and valid security so as to give the debenture-holders priority over unsecured creditors of the company there must be a registered mortgage of an already registered lease. The lease in question, though a mining lease, was a lease within the meaning of ss. 2 and 3 of Natal Law 19 of 1884, and therefore required registration in the Deeds Registry. If, on the other hand, the transaction was regarded as a purchase of a portion of the soil, by the common law of Natal it could only be effectually mortgaged by a registered instrument. MUNRO *v.* DIDCOTT - - **P. C. 140**

26. —— **NEW SOUTH WALES.**—*Public Service Superannuation—New South Wales Public Service Superannuation Act*, 1903, *s.* 4—*Gratuity for Public Service on Retirement—Discretion of Government as to the Amount—Exercise of Discretion must be reasonable, fair, and just.*

Under s. 4 of the New South Wales Public

PRIVY COUNCIL APPEALS—*continued.*

Service Superannuation Act, 1903, the plaintiff was awarded by the Public Service Board a gratuity of 23*l.* 10*s.* 1*d.* per mensem, calculated for each year of service from December 9, 1875, the date of his permanent employment, up to December 23, 1895; and upon his claiming to have his service reckoned up to August 16, 1902, was awarded a further gratuity of one penny in respect of each year subsequent to December 23, 1895, up to August 16, 1902, the date of the commencement of the Public Service Act of that year.

In an action to recover payment at the rate of 23*l.* 10*s.* 1*d.* for each year of the subsequent service :—

Held, that the award of one penny as above was illusory and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament, and that judgment should be entered for the plaintiff for the amount claimed. WILLIAMS *v.* GIDDY - - **P. C. 381**

27. —— *Revenue—Stamp Duties—New South Wales Stamp Duties Act*, 1898, *ss.* 49 *and* 52—*Construction—Intent to avoid Payment of Duty—Transaction effective and not colourable.*

In 1904-5-6 the testator bought properties in the names of his two sons by way of advancement, and subsequently received the rents and paid for rates and repairs. He died in 1909.

On a claim made by the Commissioner of Stamps against the executors in respect of the said properties, it was contended on his behalf that the testator made these gifts "with intent to avoid payment of duty" within the meaning of New South Wales Stamp Duties Act, 1898, s. 52, and that there was an implied agreement between the testator and his sons that he was to receive rents and profits during his lifetime :—

Held, that on the evidence the transactions were not colourable, but gifts out and out passing the properties to the sons to the exclusion of all interest in the father. The receipt by the father of the rents did not operate to convert a presumptive advancement in favour of the sons into a trust in favour of the father.

Grey v. *Grey* (1677, from Lord Nottingham's MSS.) 2 Swanst. 594, followed. COMMISSIONER OF STAMP DUTIES *v.* BYRNES - - **P. C. 386**

28. —— *Revenue — Stamp Duties — New South Wales Stamp Duties Amendment Act*, 1904, *s.* 14, *sub-s.* 5—*Construction—Company—Sale Consideration partly consisting of Shares—Duty assessable on their true, not necessarily face, Value.*

On April 17, 1907, a reorganized and reconstituted company accepted (in accordance with a provisional agreement dated March 26, 1907) the transfer of the property and assets of its predecessor and authorized the issue of its own shares fully or partly paid as the consideration. The appellant, under New South Wales Stamp Duties Amendment Act, 1904, s. 14, sub-s. 5, assessed the transfer stamp duty on the value of the shares so issued, attributing to them as value the amounts reckoned as paid up :—

Held, that the Supreme Court was right in holding, on a special case, that April 17, 1907, was the date of assessment, and that the Commissioner was wrong in refusing to consider evidence tendered to shew that the amount reckoned as paid up on the said shares, though prima facie evidence of value at the date of issue, was not their real value at the date of assessment. STAMP DUTIES COMMISSIONER *v.* BROKEN HILL SOUTH EXTENDED, LIMITED **P. C. 439**

29. —— *Streets—New South Wales Moore Street Improvement Act*, 1890, *ss.* 4 *and* 6—*Construction — Effect of Assessment on Owners within the Improvement Area—Liability of Owner for Time being.*

The New South Wales Moore Street Improvement Act, 1890, authorized the appellants to make street improvements, the cost thereof (see ss. 4 and 6) to be divided between the whole body of ratepayers under a special street improvement rate and the owners of property within the improvement area.

In a suit by the appellants to enforce liability for the unpaid amounts assessed in respect of three properties within the improvement area the judge ordered its dismissal on the ground that with regard to two of the houses they ought to have been separately assessed, and in regard to the third that the defendants were not the successors in title of the person originally assessed :—

Held, that the appellants were not required to assess each house separately, but only the properties of owners, and that, the improvement having been duly commenced and the assessment on owners duly completed according to the requirements of ss. 4 and 6, the owner for the time being was liable for the amount assessed upon his property and for arrears not exceeding three years before suit. SYDNEY MUNICIPAL COUNCIL *v.* FLEAY - - - - **P. C. 371**

30. —— **NEW ZEALAND**—*Family Protection—Will—New Zealand Family Protection Act, Part II.* (*No.* 60 *of* 1908), *s.* 33 (1.)—*Discretion of the Court not interfered with—Provision ordered for Testator's Married Daughters.*

New Zealand Family Protection Act, Part II. (No. 60 of 1908), s. 33 (1.), provides that in cases where any person dies leaving a will without making adequate provision therein for the proper maintenance and support of the testator's wife, husband, or children the Court may, at its discretion, order that such provision as it thinks fit should be made out of the estate of the testator for such wife, husband, or children.

The Court below having exercised its discretion in favour of three married daughters of the testator by a wife who had divorced him, his will disposing of all his estate in favour of his second wife and her children, their Lordships declined to interfere ; and approved the general view taken by the Court below as to the proper scope and application of the powers conferred by the Act. ALLARDICE *v.* ALLARDICE **P. C. 730**

—— Ontario, Laws of.
See Nos. 15—18, above.

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—— Quebec, Laws of.
See Nos. 19, 20, above.

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RAILWAY — Canadian Railway Act, 1906 — Powers of the Railway Board—Highway —Construction - - - - **461**
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—— Mines of coal, ironstone, slate, and other minerals—Fireclay - - - **290**
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—— Railway construction contract—Exemption of lands from taxation - - - **328**
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—— Sidings—Action for damages—Removal of a siding constructed for convenience of traffic — Limitation — Appeal from Canada - - - - - - **739**
See PRIVY COUNCIL APPEALS. 8.

RATES — *Poor Rate — Rateability — Sewers underground and overground—Payment received for use of Sewers—Beneficial Occupation.*

Under statutory powers the appellants acquired easements through lands in Kent and constructed and maintained main sewers which were laid partly in private lands and partly in public highways. Some of the sewers were wholly underground; the others were partly underground and partly overground. They were constructed and maintained by levying the statutory rates. The appellants made no profit from their occupation of the sewers, but received payments from occupiers of mills and other persons for leave to discharge their sewage or trade refuse into the sewers :—

Held, affirming the decisions of the King's Bench Division and the Court of Appeal (not reported), that sewers whether overground or underground are rateable where the occupation is "valuable" within the meaning of the authorities on rating, and that the appellants were rateable in respect of all the sewers.

West Ham v. *London County Council* [1893] A. C. 562, 597, discussed. WEST KENT MAIN SEWERAGE BOARD *v.* DARTFORD UNION ASSESSMENT COMMITTEE, &c. - **H. L. (E.) 171**

REDEMPTION—Mortgage.
See under MORTGAGE.

REGISTRATION — Mining lease — Cession to trustees by way of mortgage—Laws of Natal - - - - - - **140**
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REVENUE—*Income Tax—Deductions—Profits of Brewery—Tied Licensed Houses—Compensation Levy—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Cases* 1 *and* 2, *r.* 1; *Sched. D.*

A brewery company as an essential part of their business acquired and held licensed houses which they let to tenants who covenanted to buy all their beer from the company. The sole purpose of the company in thus acting was to increase the profits of their trade in manufacturing and selling beer wholesale. If any house lost its licence the company got rid of that house as soon as possible. The annual compensation levy imposed by the Licensing Act, 1904, s. 3, was paid as to the company's share of the levy by the tenant paying that share and deducting it from his rent as provided by the Act.

In estimating for income tax purposes the yearly profits of their trade—which were increased by their ownership of the houses—the company claimed to make a deduction in respect of the sum which they were compelled to pay for the levy, and contended that the sum was "wholly and exclusively laid out or expended for the purposes of their trade" within the meaning of the Income Tax Act, 1842, s. 100, cases 1 and 2, r. 1; Sched. D. :—

Held by the Earl of Halsbury and Lord Atkinson (Lord Loreburn L.C. and Lord Shaw of Dunfermline dissenting), that upon the facts as stated by the Income Tax Commissioners a deduction was allowed by the Income Tax Act, 1842.

The House being equally divided, the decision of the Court of Appeal [1909] 2 K. B. 912, was affirmed. SMITH *v.* LION BREWERY COMPANY **H. L. (E.) 150**

—— Dividend duties—Western Australia Dividend Duties Act, 1902—Construction—Company—Duty on dividends declared
See PRIVY COUNCIL APPEALS. 4. **480**

—— Stamp duties—New South Wales Stamp Duties Act, 1898 - - - - **386**
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—— Stamp duties—New South Wales Stamp Duties Amendment Act, 1904—Construction - - - - - - **439**
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RIVER—Fishing—Exclusive right of the Crown to fishing—Letters patent in respect of lands did not convey fishing rights—Construction - - - - - **489**
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—— **Order LXV., r. 26a**—*Costs* - - - **688**
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RUSSIA—Extradition Treaty with—Proof of requisition a condition of arrest or committal—Appeal from Manitoba **735**
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SALE—Company.
See under COMPANY.

—— Mortgage—Power of sale—Suit for redemption of mortgage—Duty of mortgagees
See PRIVY COUNCIL APPEALS. 11. **722**

SALE OF GOODS—*Agent—Authority of Agent to receive Payment in Cash—Directions as to Payment by crossed Cheque and Form of Receipt.*

The appellants, sponge importers, employed a traveller to carry with him for sale parcels of sponges. When a bargain was concluded it was the duty of the traveller to forward to the appellants a sale sheet containing particulars of the transaction. The appellants then forwarded to the customer an invoice recording the transaction, which was followed monthly by a statement of account. The statement of account contained three printed notices to customers—first, "Cheques to be crossed"; second, "All cheques to be made payable to International Sponge Importers"; and third, "No receipt valid unless on the firm's printed form to be attached hereto." The respondents had for some years dealt with the appellants on this system. In 1905, 1907, and 1908 the traveller sold three parcels of sponges to the respondents. In the first and second transactions he induced the respondents to pay for the sponges by a cheque payable to him. On the third occasion they paid him 120*l.* in notes and gold. The traveller, who had no actual authority to receive in payment of sponges anything except crossed cheques in favour of the appellants, fraudulently appropriated the amount of the payments made to him by the respondents:—

Held, affirming the decision of the Second Division of the Court of Session (1909) 2 Scots L. T. 24, that the payments to the traveller were valid as against the appellants, for the notices in the statements of account did not contain a sufficient intimation to their customers that the traveller was not authorized to receive payment for goods delivered in cash or in a cheque in his favour which could be cashed at once. INTERNATIONAL SPONGE IMPORTERS, LIMITED *v.* ANDREW WATT & SONS - - **H. L. (Sc.) 279**

2. —— *Delivery of Goods not of Contract Description—Resale by Purchaser—Condition—Warranty—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 11, 53.

The respondents sold seed to the appellants as "common English sainfoin" on the condition that "sellers give no warranty expressed or implied as to growth, description or any other matters." The seed delivered to the appellants was not "common English sainfoin," but "giant sainfoin," a different and inferior seed. The appellants accepted the seed believing it to be "common English sainfoin" and resold it as such to other parties, to whom the appellants were obliged to pay damages for the mistake:—

Held, that the appellants were entitled to the

SALE OF GOODS—*continued.*

remedies applicable to a breach of warranty and to recover from the respondents the damages which the appellants had been obliged to pay to the other parties.

Decision of the Court of Appeal [1910] 2 K. B. 1003, reversed upon the grounds given by Fletcher Moulton L.J., who dissented. WALLIS, SON & WELLS *v.* PRATT & HAYNES - **H. L. (E.) 394**

—— Contract, Breach of—Damages—Indemnity against loss - - - - - **301**
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SCHOOLS—*Public Elementary School—Provided and Non-provided Schools—Local Education Authority — Teachers' Salaries — Right to differentiate—Failure to maintain and keep efficient — Board of Education — Decision of Board—Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 3; *s.* 16.

The duty of maintaining and keeping efficient a non-provided school imposed upon a local education authority by s. 7 of the Education Act, 1902, is a matter which can be a "question" between the authority and the school managers so as to come within the jurisdiction of the Board of Education.

A local education authority refused to pay salaries to teachers in a non-provided school at the same rate as it paid the teachers in provided schools. The managers of the non-provided school complained, and the Board of Education directed an inquiry, the result of which was a report that the local education authority had failed to maintain the school and keep it efficient. The "questions" required by s. 7, sub-s. 3, to be determined by the Board of Education were: "(1.) Whether the local education authority have in fixing and paying the salaries of the teachers fulfilled their duty under s. 7, sub-s. 1, of the Act; (2.) whether the salaries inserted in the teachers' present agreements are reasonable in amount and ought to be paid by the authority, or what salaries the authority ought to pay." The Board purported to give its decision in a document which failed to deal with the matter in issue:—

Held, that inasmuch as the Board had not determined the questions, the decision must be quashed by certiorari, and a mandamus must issue commanding the Board to determine the question.

The right of a local education authority to differentiate between schools in regard to the scale of salaries or the standard of efficiency, in the absence of special circumstances appropriate to the differentiation, discussed.

Decision of the Court of Appeal, [1910] 2 K. B. 165, affirmed. BOARD OF EDUCATION *v.* RICE - - - - - **H. L. (E.) 179**

SCOTTISH LAW—*Succession—Election—Approbate and Reprobate—Invalid Exercise of Power*

SCOTTISH LAW—*continued.*

of Appointment—Conditions of Acceptance of Legacies.

It is the law of Scotland as of England that no person can accept and reject the same instrument. Where therefore a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them.

A testator gave the life rent of a fund to his daughter and the fee to her children "in such proportions . . . . and subject to such restrictions provisions and limitations as she may direct" and failing such directions then equally among them. The daughter by one comprehensive trust disposition and settlement which was not a good exercise of the power of appointment gave the fund massed with her own estate to her children in life rent and to their children in fee:—

Held, reversing the decision of the First Division of the Court of Session, 1910 S. C. 484, that the children of the daughter claiming the fund in default of appointment must be put to their election between their own rights and the benefits conferred on them by the will, and they could not accept part and reject part of the same will. PITMAN *v.* CRUM EWING - **H. L. (Sc.) 217**

—— Agricultural Holdings (Scotland) Act—Compensation for improvements—Notice of claim—Agreement - **246**
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—— Minerals—Fireclay—Railway - - **290**
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—— Trustee—Compromise on advice of law agent—Personal liability of trustee - **253**
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SEWERS—Poor rate—Sewers underground and overground—Payment received for use of sewers - - - - - - **171**
See RATES.

SHAREHOLDERS AND SHARES—Company.
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SHIPPING—*Collision—Damage—Both Ships to Blame—Limitation of Liability—Cargo Owner—Division of Loss—Rule in force in the Court of Admiralty—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

The rule laid down in *The Milan* (1861) Lush. 388—that where both ships are to blame for a collision, the owners of cargo on one ship can recover a moiety of their damages and no more against the owners of the other ship—is a rule in force in the Court of Admiralty within the meaning of s. 25, sub-s. 9, of the Judicature Act, 1873.

Decision of the Court of Appeal, *The "Drumlanrig"* [1910] P. 249, affirmed. OWNERS OF CARGO OF S.S. "TONGARIRO" *v.* OWNERS OF S.S. "DRUMLANRIG." THE "DRUMLANRIG" **H. L. (E.) 16**

2. —— *Collision—Tug and Tow—Negligence of Tug—Non-liability of Tow.*

A tug was towing a barge at the entrance to the river Mersey on a dark night and was navigated in such a manner that the barge came into collision with a lightship. In an action by the owners of the lightship against the tug and the barge the President held that the tug and the barge were both to blame:—

Held (Lord Robson dissenting), that as a pure question of fact in the circumstances the barge was entitled to expect that the tug would be reasonably well navigated and to act upon that belief, and that the barge was not to blame.

Decision of the Court of Appeal, *The "W. H. No. 1" and The "Knight Errant"* [1910] P. 199, affirmed. OWNERS OF LIGHTSHIP "COMET" *v.* OWNERS OF THE "W. H. No. 1." THE "W. H. No. 1" AND THE "KNIGHT ERRANT" **H. L. (E.) 30**

3. —— *Seaworthiness — General Average—Onus of Proof.*

A steamship started on a voyage from Libau to Leith with a general cargo. A few hours after she put to sea her feed pumps broke down with the result that the boilers had to be fed with sea water by means of the donkey engine. She met with bad weather and put into Elsinore for repairs after sustaining damage to ship and cargo. Particular average charges were incurred at Elsinore in connection with the discharge, reconditioning, and reloading of the cargo. In an action by the shipowners to recover from the owners of the cargo a contribution to general average and also a proportion of the charges incidental to the discharging and reloading of the cargo:—

Held, reversing the decision of the First Division of the Court of Session, 1910 S. C. 231, that the defendants were not liable, for in the circumstances the onus was on the plaintiffs of shewing that the ship was seaworthy at the commencement of the voyage, and they had failed to discharge that onus. LINDSAY *v.* KLEIN. THE "TATJANA" - **H. L. (Sc.) 194**

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New Zealand, Statutes of:

New Zealand Family Protection Act, Part II. (No. 60 of 1908), s. 33 (1.) 730
See PRIVY COUNCIL APPEALS. 30.

STOCK EXCHANGE — *Broker and Client — General Lien.*

Stockbrokers who have received transfers of stock or shares for delivery to a customer have by the law of Scotland a general lien on these transfers for the balance due to them by the customer.

The appellants, stockbrokers in Edinburgh, claimed to retain in their hands an uncompleted transfer of shares purchased and paid for by the respondent until a claim by the appellants arising out of a subsequent transaction between them and the respondent was satisfied :—

Held, reversing the decision of the Second Division of the Court of Session, 1911 S. C. 209, that the appellants as stockbrokers had a general lien on the transfer in question until the claim against the respondent was satisfied. JOHN D. HOPE & CO. *v.* GLENDINNING - **H. L. (Sc.) 419**

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TOW—Shipping—Collision—Negligence of tug — Non-liability of tow - - - 30
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TRADE—*Passing off—Get-up—Abortive Patent — Utility — Get-up serving Useful Purpose — Deception of ultimate Purchaser—Injunction.*

The plaintiffs' predecessor in business took out a patent, which was revoked before the plaintiffs took over the business, for parcelling up blue or other colour in a porous cloth or bag with a handle attached to it, so that the colour could be dissolved in water without staining the hands of the operator. During the continuance of the patent and for eighteen years after its revocation the plaintiffs and their predecessor in business sold laundry blue put up in a calico bag with a wooden stick attached to it of the kind shewn in the drawings annexed to the specification. These bags bore no name, but the get-up, of which the stick was the distinctive feature, had become identified in the mind of the public

TRADE—*continued.*
with the plaintiffs' goods. The defendants exactly imitated the get-up of the plaintiffs' goods, except that they attached to the bags a label bearing their name. The plaintiffs moved for an injunction to restrain the defendants from passing off their laundry blue as the plaintiffs' by imitating the get-up of the plaintiffs' goods, but they disclaimed any monopoly in the use of any stick for the get-up for laundry blue :—

Held, that the defendants were not entitled to appropriate the plaintiffs' get-up, either on the ground of the abortive patent or on the ground that the stick was an article of utility ; that the defendants' get-up was calculated to deceive, the addition of the label, in the circumstances, not being a sufficient distinction ; and that the defendants ought to be restrained by injunction.

Decision of the Court of Appeal [1911] 1 Ch. 5, reversed and order of Swinfen Eady J. varied. WILLIAM EDGE & SONS, LIMITED *v.* WILLIAM NICCOLLS & SONS, LIMITED
H. L. (E.) 693

TRADE MARK—Descriptive word—"Standard"
See PRIVY COUNCIL APPEALS. 20. **78**

TRUSTEE—*Compromise on Advice of Law Agent—Personal Liability of Trustee—Duty to make Annuities Real Burden on the Estate—Scottish Law.*

A testator whose assets consisted of heritable and personal property used in his business by trust disposition and settlement disinherited the children of his first marriage and his daughter by his second marriage, leaving them nothing whatever, and directed his trustees to pay to his wife an annuity of 300*l.* per annum during her life, and an annuity of 200*l.* to his son John and Helen his wife during their lives, and to convey to his son George the whole residue of his estate, "but always with and under the burden of the liferent to my said wife of my properties in Glasgow and Girvan, and also under burden of the payment of the annuities to my said wife and to my son and his wife."

The disinherited children upon the death of the testator threatened to take legal proceedings to set aside his disposition on the ground of want of capacity and undue influence, and also claimed to recover their legitim share of his assets.

The trustees (one of whom was the appellant), acting on the advice of a law agent of high standing and acknowledged character in the profession, compromised the claims, and borrowed the sum required to carry out the compromise on the security of the heritable estate. They also allowed the son George to take possession of the business without making the annuities to the son John and his wife primary real burdens on the heritable subjects. After a few years the business failed, and there was not sufficient to pay the annuitants :—

Held, reversing the decision of the Second Division of the Court of Session, that the appellant was not liable for breach of trust, for there was no proof that he and his co-trustees in

TRUSTEE—*continued.*
agreeing to and carrying out the compromise had been guilty of negligence. EATON *v.* BUCHANAN
H. L. (Sc.) 253

Note.—Appeal from a judgment of the Second Division of the Court of Session, Scotland, dated March 16, 1910. See for an earlier stage of this litigation, 1909 S. C. 47.

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TUG—Shipping—Collision—Negligence of tug—Non-liability of tow - - - **30**
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ULTRA VIRES—British Columbia, Laws of—Water rights — Provincial legislation relating thereto ultra vires - - **87**
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—— "Standard" - - - - - - **78**
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—— "Workman" - - - - - - **188**
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